

**THE CROWN RIGHTS OF THE REDEEMER:  
A REFORMED APPROACH TO SOVEREIGNTY FOR THE  
NATIONAL CHURCH IN THE 21<sup>ST</sup> CENTURY**

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I hereby declare that this work was researched and written by me alone.

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## ABSTRACT

This thesis argues that the Church of Scotland is hampered in the proper exercise of its inherent power of spiritual jurisdiction by the predominance of a model of sovereignty that owes more to secular political science than to Christian theology. Chapter One analyses sovereignty from a Reformed theological perspective, founding on a prior doxological conception of the sovereignty of God. The result is a model of 'diakonal' sovereignty expressed in covenant relation between God and his people. Chapter Two describes the emergence of a conception of the relationship of authority between Church and state in post-Reformation Scotland that relied excessively on a 'Two Kingdoms' theory of authority. Chapter Three describes the constitutional crisis produced by the events of the 1840s, and the solution that was enshrined in the Church of Scotland Act of 1921 and the Fourth Article Declaratory appended thereto. This settlement is useful for asserting the Church's internal freedom to regulate *spiritualia*; but as a model of a legally sovereign institution, it was always constitutionally imperfect and obsolescent. Chapter Four traces the fate of the settlement in the last eighty years. The Church's legal privilege has diminished, and its independence been threatened by legislation and case-law; meanwhile the nation state has fragmented to such an extent that it may no longer have the ability to guarantee the Church's freedoms under the terms of the Act. Chapter Five recounts fourteen conversations held with men of experience and influence in the field of Church-state relations; conversations in which issues of Establishment (now barely relevant in the constitution of the Church), religious human rights (a partial, but inadequate alternative basis of religious liberty) and spiritual freedom itself (a separate matter from spiritual jurisdiction) were discussed in depth. Chapter Six concludes that a new philosophy of legal authority is needed to replace the one supporting the 1921 Act and the Articles. It must be a philosophy of service not domination; and it should not be enslaved to any particular understanding of sovereignty, not even a temptingly traditional, Scottish model. It must serve *ecclesia semper reformanda* and the Church as *communio*, not as *societas perfecta*. This produces a suggested re-writing of the Fourth and Sixth Articles Declaratory, on the separation of jurisdictions and the relationship between the Church and the civil magistrate. Only such a re-writing can restore the relevance of the constitutional foundation of the Church of Scotland and defend the spiritual freedom the Church must demand - to obey God above all earthly authority.

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## INTRODUCTION

At 10 a.m. on the third Saturday of May each year, there is constituted in Edinburgh a Parliament – complete with legislature, executive and judiciary – that has as much dignity, integrity and recognition in British law as the Westminster Parliament, the Scottish Executive or the European Court of Justice. It is the General Assembly of the Church of Scotland, the most senior court<sup>1</sup> in that Church's Presbyterian government, and it meets on seven consecutive days each year.<sup>2</sup>

Observation of the first morning's proceedings reveals the systematic completeness of the miniature system of governance that springs to life each May.<sup>3</sup> Included in a busy agenda are a number of highly significant pieces of business that are described here in the order in which they are transacted.<sup>4</sup>

The holding of the General Assembly has been determined by the final legislative Act of the last year's General Assembly and so the Moderator of the previous year constitutes the Assembly with worship. From that point until the dissolution of the court the following Friday evening, the General Assembly is deemed to be meeting, and whenever it is not in session it is in a state either of suspension<sup>5</sup> or of adjournment,<sup>6</sup> but not of dissolution.

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<sup>1</sup> In Presbyterian governance, 'court' is not used only of a body exercising a judicial function, but is a generic term to describe the formal governing bodies: Kirk Session, Presbytery and General Assembly.

<sup>2</sup> The authoritative up-to-date text describing the governance of the Church of Scotland is J.L. Weatherhead, ed., *The Constitution and Laws of the Church of Scotland* (Edinburgh: Board of Practice and Procedure, 1997)

<sup>3</sup> The minutes of each day's proceedings may be found shortly afterwards on the Church of Scotland's web-site, and they are published in the expanded edition of each year's *Volume of Reports*, which is produced towards the end of the calendar year in which the Assembly took place.

<sup>4</sup> All the specialist terminology in the next few paragraphs is explained in the course of this thesis, and so it is not translated or amplified at this point.

<sup>5</sup> Normally for brief pauses between ceremonial or worship and business, and for meal-breaks

<sup>6</sup> Normally overnight, or between two separately-numbered sessions on the first and final days. Presbyteries, the intermediate courts of the Church, are adjourned from one meeting to the next, so those adjournments may last for weeks or months at a time. The General Assembly, however, does not adjourn from one year to the next, but is dissolved and re-constituted. This is illustrated by the most formal usage, 'the General Assembly of 2004', not 'the General Assembly in 2004'.

As soon as the new Moderator has been elected and installed, the bulk of the opening ceremony consists of an exchange of pleasantries between the Moderator and the Lord High Commissioner (the Crown's observer).<sup>7</sup> The Lord High Commissioner sits in a gallery behind the Moderator's chair on the North side of the Assembly Hall, and from this gallery there is no direct access to the floor of the Hall but only via the outside corridor. This signifies the separation of the Crown's interest (and, by extension, that of the state) from the business of the Church court, and reminds everyone that for constitutional purposes the Lord High Commissioner is present only to listen to the proceedings and report them to the Queen afterwards.<sup>8</sup> This part of the business begins with the reading to the Assembly of the Commission in favour of the individual chosen to represent the monarch in this way, followed by the reading of a letter from the Queen, which always contains the re-iteration of the Accession Oath obligation to 'uphold the rights and privileges of the Church of Scotland'.<sup>9</sup> When His or Her Grace<sup>10</sup> addresses the Assembly in reply to the welcoming words of the Moderator, it is strictly at that court's invitation.

Before a short suspension is called, the Assembly receives the Standing Orders by which all its business is ordered, and it is ready to begin its legislative, executive and judicial work for the week. This three-fold distinction of powers is apparent before the first morning is over. Measures that have been referred down under the Barrier Act of 1697 and found acceptance in Presbyteries, are brought back to the General Assembly under the report of a technical committee that classifies and

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<sup>7</sup> The monarch may of course attend in person. Queen Elizabeth II has attended at key points during her reign, most recently in 2002 on the occasion of her Golden Jubilee.

<sup>8</sup> Douglas Murray describes the consternation that was caused when the Assembly of the Union of the Churches in 1929 was held in the Industrial Hall in Annandale Street, Edinburgh. Its layout meant that the Duke of York (Lord High Commissioner for the Assemblies of that year) could take a direct route to the makeshift throne gallery only by trespassing over the floor of the court itself. His Grace was entirely sensitive to the symbolism and insisted on using a side door with direct access to his gallery, to prevent constitutional anxieties. D.M. Murray, *Rebuilding the Kirk: Presbyterian Reunion in Scotland 1909-1929* (Edinburgh: Scottish Academic Press, 2000) p. 178-9

<sup>9</sup> This letter, along with a reply sent to the Queen by the General Assembly through the offices of the Lord High Commissioner's Purse-bearer, are copied into the opening pages of the expanded *Volume* already mentioned.

<sup>10</sup> 'Your Grace' is an ancient Scottish equivalent to the English 'Your Majesty', and is a distinction awarded the Queen's Commissioner for the duration of the one-week commission. During that period, the individual acquires the monarch's rank in Scotland because he or she is replacing the Crown's person and exercising their functions. The Assembly addresses the monarch attending in person as 'Your Majesty'.

analyses the responses, so that they may be enacted as permanent legislation. Other pieces of legislation are likely to be brought under the first major committee report, that of the Board of Practice and Procedure, whose department contains the Church's legislative drafting unit. This report, like all the committee reports that fill the bulk of the Assembly's time, describes the diligence of an executive agency of the Assembly, and the debate that follows constitutes the scrutiny that is the function of that accountability. Finally, before the lunch-time adjournment, the General Assembly receives a report from its Committee on Bills and Overtures, through which items of judicial and quasi-judicial business are brought, along with the Committee's suggestions for the method of disposal of those cases and its recommendations on questions of their legal competence and relevance.<sup>11</sup>

This sketch of parts of the first Sederunt of each General Assembly is sufficient to emphasise that the Church of Scotland has a system of government and law that parallels in certain respects the institutions of a nation state.

### **The Church of Scotland – a sovereign institution?**

The mention above of the exclusion of the state's interest in the business of the General Assembly indicates the striking and peculiar nature of the Church of Scotland's institutions of government. There is nothing particularly significant *per se* in a group or social body mimicking the institutions of government. Anything from a well-organised family to a multinational company may have clear mechanisms for making rules that bind all the members of the organisation, fulfilling tasks with accountability, and finding internal ways to resolve disputes and encourage conformity. These organisations are nevertheless subject to the whole law of the land and cannot exempt themselves from part of it. The civil courts can intervene in any part of the life of the family or company etc, and only the civil law will determine what those interventions might be and how far they might reach.

The Church of Scotland, by contrast, understands its writ of governance to run in parts of its life over which the law of the land does not and cannot extend.

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<sup>11</sup> It should be noted that most judicial cases, certainly such Appeals, Dissents and Complaints and Petitions that seek to review the decisions of lower courts, are now heard throughout the year by the Commission of Assembly established by Act VI 1997 anent the Commission of Assembly. The Commission has the powers and authority of the General Assembly for its work and is for legal purposes as a specialist arm of the Assembly itself, not merely an agency or committee thereof.



The legal institutions of the Church have some responsibilities that are not subject to any regulation by civil law, and the jurisdiction of the Church's courts covers situations in which the legislative and judicial powers of national government cannot act. The foundation of this unique legal identity is the *Church of Scotland Act 1921* and its Appendix, the *Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual*, which latter declares for the Church:<sup>12</sup>

‘...the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church...’

This extraordinary authority produces many questions in law and jurisprudence, in ecclesiology and theology, that are the questions this thesis addresses.

There are legal questions about the meaning of this special legal structure. The most important of these is the question of whether the 1921 Act has created a sovereign power alongside the sovereignty of the British nation state. The legal and jurisprudential analysis of the Church's position appears to suggest that the Church has an independent ‘sphere’ of sovereignty.<sup>13</sup> It is as different in its own way from the British state as the sovereignty of the Vatican State differs from the jurisdiction of the city of Rome, but in each case one little, separate area of authority arguably exists inside another. The answer to the sovereignty question depends on the extent to which the Church's jurisdiction is self-contained, free from external interference and sufficient in its internal authority.

There are historical questions about the origins and sustainability of these arrangements. These questions ask how the history of Church-state relations in Scotland came to produce this particular outcome; how the continuing sweep of history since 1921 has altered the status of the Act and its intention today; and what we may reasonably expect will happen to the constitutional relationship between the Church and the nation in the future. The answers to these questions require an understanding of the past, an analysis of the *status quo* and a willingness to predict what might happen next.

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<sup>12</sup> Article IV, see Murray, *Rebuilding the Kirk: Presbyterian Reunion in Scotland 1909-1929* p. 285

<sup>13</sup> This is the interpretation given by Sir Neil MacCormick in his unpublished Greenbank lecture ‘The Kirk and the Theory of Sovereignty’



There are theological questions about the merit of this peculiar legal arrangement. These questions ask whether and why the Church has any need for such an independent legal realm; whether the courts of the Church properly seek powers parallel to those of the civil magistrate; and whether there is an alternative, theologically legitimate way of protecting the Church's legal interests. To answer these questions requires a sense of what tasks the Church must fulfil and what tasks belong to the rest of the world.

The overall answers to these questions of law, history and theology are of pressing need within the Church of Scotland. The principal contention of the thesis will be that the Church of Scotland is hampered in the proper exercise of its inherent power of spiritual jurisdiction by the predominance of a model of sovereignty that owes more to secular political science than to Christian theology. As that model disintegrates, so the spiritual jurisdiction of the Church is in danger of disappearing. If the Church becomes no longer able to found its right of distinctive obedience to God on a basis it can plead in civil law, it will become unable to be legally distinctive from any other kind of social institution, and will lose much of its *raison d'être*. Before that disintegration of the sovereignty model is complete and the freedoms of the Church (contingent on that model during the twentieth century) are completely lost, it is urgently important to supply a better, sounder, more secure conceptual foundation for the Church's polity and governance. The sources for this research are partly scholarly and academic and partly the ecclesiastical voices of protagonists through the post-Reformation history of the Scottish Church and up to the present. The conclusions are for the Church's use and application, and they are not only of academic or abstract interest.

## **Methodology**

The settlement between Church and state in Scotland in 1921 is often regarded as an effective solution to a complicated set of historical problems. This thesis does not presume anything about the merit of the settlement, but tries to understand the pressures that made things turn out the way they have, and the strengths and weaknesses of that outcome. The result is a very broad, interdisciplinary analysis involving strands of political and legal philosophy, Reformed theology and Church history; and it uses techniques of primary sociological research, the theological application of the theories of political science and the analytical

reading of legislation and case-reports. The contemporary pressures on the Church of Scotland as a national institution are the complex product of different social, political and legal forces of change. As a result, this thesis has to take many elements of the problem into consideration, and keep several disciplines in view throughout its course.

It was important to resist the temptation of assuming from the outset of the research that its outcome must be a call for change in the Church of Scotland or its constitutional basis. Whilst it was reasonable to suspect that a definition of Church-state relations last set out eighty years ago would prove to be showing its age on close inspection, it was undeniable that its basic legal presuppositions still worked in modern case-law. Therefore the research, widely evidence-based as it was, avoided pursuing and serving any particular conclusions, but an open mind was kept on the issues addressed in the Conclusion to this thesis.

The thesis begins with the examination of the concept of a ‘sovereign’ body in law, and explores the characteristics of sovereignty, its extent and limitations and the possible places in which sovereign power might be located within the community that exists under any legal system.<sup>14</sup> Various disciplines combine for this analysis. It is in part philosophical and jurisprudential because it addresses questions of the existence of sovereignty; how it can be known and recognised; and whether any of its invariable qualities are self-evident. It is in part an exercise in political theory because it involves the ways in which societies may organise themselves and the power and influence that exists within them. It is in part a theological task because it asks how the sovereign institutions of human life relate to the ultimate sovereignty of God as confessed by the Christian Church; what is the source of political sovereignty; and what is the status of any sovereign authority using power in ways that the Church believes do not serve God. It is a theological task in another sense too, because the principal subject is the Church of Scotland as a legal institution. The model of sovereignty that is produced by the analysis has to be one that is consistent with the Church’s theological tradition, a tradition that is Reformed, ecumenical and tolerant of very diverse points of view on such subjects as doctrine, ethics, Biblical interpretation and ecclesiology.

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<sup>14</sup> Chapter One

With a definition of the anatomy of sovereignty and models with which to compare the Church, the next part of the thesis describes the growth of the institution, from the point at which it began life as a Reformed Church to the point at which it reached its current legal status as the national Church.<sup>15</sup> Before the Reformation, the Church had long been involved in debates about sovereignty, because it had been a protagonist in European history along with Empires and nation states.<sup>16</sup> The Reformed Churches from the outset inherited a debate about the religious duty of the civil magistrate, and equally about the civic duty of the institutional Church.<sup>17</sup> The debate continued unresolved in many places during the period when Protestantism replaced Roman Catholicism in many societies, and still after that transition was over and the new Churches were able to consolidate their authority. In Scotland, the growth of the Church's polity was uneven because it developed as the Church passed through religious war, political crisis and internal theological rift over the first 200 years after the Reformation. When the leaders of the main Presbyterian Churches at the beginning of the twentieth century had the opportunity and responsibility of stating afresh the legal identity of the Church of Scotland, they were able to try to remove what seemed unhealthy (principally the instances of state interference that the Church most resented on grounds of its need for spiritual freedom).<sup>18</sup> This attempt at restorative surgery within the constitution of the Church produced its current legal state, but the account in this thesis pauses to assess the health of the settlement immediately after it was achieved.

This study treats as a single phase in the constitutional life of the Church of Scotland the period between the 1921 settlement and the point at which the next major structural change is made to the arrangements between Church and state. That latter point has not been reached at the time of writing, and its time cannot be predicted, so a description is given of the decline and disease of the Church's legal

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<sup>15</sup> This part of the thesis is divided into two chapters (Two and Three), the first of which proceeds at a quick pace through a chronological review of two centuries; the second of which examines in much greater depth the events of less than a century immediately before 1921.

<sup>16</sup> See for example M. Wilks, *The Problem of Sovereignty in the Later Middle Ages: the Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge: CUP, 1963)

<sup>17</sup> See for example Book IV of Calvin's *Institutes*: J. Calvin, *Institutes of the Christian Religion*, translated by Henry Beveridge (London: James Clarke and Co Ltd, 1962), which concerns the Church and includes the teaching on Church and state.

<sup>18</sup> The most notorious examples of what some saw as state interferences were the legal cases in the 1830s and early 1840s, and these are described in Chapter Three.

security that is necessarily – it must be assumed – incomplete. Three sorts of threat are identified.<sup>19</sup> The first is the effect of the changing legal context in which the Church's law tries to survive: the structures of civil law and politics are changing and the Church is losing the environment in which it was once able to do its work and be acknowledged and understood.<sup>20</sup> The second kind of threat comes from hostile or dissatisfied parties who have a personal interest in questioning the right of the Church to deal with them in ways that cannot be challenged in civil law.<sup>21</sup> The third threat is not a destructive one, but is the temptation to protect the institution's activities and freedoms in an entirely new way, resorting to the natural, inherent rights of all human beings rather than the inherent authority of the Church as the Body of Christ.<sup>22</sup>

Who can possibly guess what lies ahead for the Church's peculiar legal system so vividly displayed each May? If anyone can predict the next stages in the Church's legal life, it must be the protagonists who occupy positions of influence within the Church's legal system and within the parts of civil government that engage with the Church constitutionally. Those who, in the past or the present, have built up detailed knowledge of the ways in which the religious community in Scotland connects structurally and culturally with the civil society are most familiar with the parts of the anatomy of the Church under investigation. Therefore a prognostic exercise is described,<sup>23</sup> a consultation with expert observers and current practitioners who each discussed with the author the questions outlined above. They provided perspectives on the concept of legal sovereignty, including many that were distinctively Scottish and distinctively Christian; and they tackled the questions around Church-state relations from a variety of viewpoints including those of

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<sup>19</sup> In Chapter Four

<sup>20</sup> This part of the argument acknowledges the contentions of scholars of sovereignty who point out the fragmenting and diversifying nature of civil powers: see for example N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: OUP, 1999), S. Sassen, *Losing Control?: Sovereignty in an Age of Globalization* (NY: Columbia UP, 1996) and S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (London: Touchstone, 1998)

<sup>21</sup> This includes a review of the small corpus of case law in Scotland relating to the relation between the Church of Scotland and the civil jurisdiction.

<sup>22</sup> The incorporation of the provisions of the European Convention of Human Rights into primary legislation by the Scottish Parliament in 1999 increases the significance of individual rights as a common conceptual currency in legal philosophy.

<sup>23</sup> In Chapter Five

minority denominations and secular politics. They wrestled with the balance to be found between the necessary freedoms of the Church and the need for it to engage with its surrounding community; and they pondered the alternative protections to be found for Christians in the language of individual rights. They reflected on the changing experience of the state's support for the national Church; and they speculated on the last resort of following individual conscience with no institutional protection at all. Among them, they suggested the directions and places in which conclusions to the research, and answers to the big questions, might be found.

### **The outcomes of the research**

Several different pronouncements are possible in respect of the current Church-state settlement of the Church of Scotland, and the final task in this thesis is to decide which is best. One is that it is still in good working order and still achieves the aims for which it was set up. There are two reasons why this is probably the natural view of those few people who ever think about the question. Firstly, there is so little literature that takes an analytic approach to this topic that the debate can hardly be described as current. The vulnerability of the Act and Articles has been so little scrutinised in public that most of those who have heard of it have never been encouraged to wonder whether anything is wrong with it. Secondly, the settlement has been so rarely put to the test that it can hold together just well enough to appear strong. Few enough cases have emerged that lie in the disputed area on the outer edge of the spiritual jurisdiction of the Church, that the separation of spheres of authority works – but only because it comes under so little pressure. Most of that pressure has come very recently, and this research has made the first written analysis of the events and precedents of very recent legal history. The conclusion is that an affirmation of and reliance on the 1921 settlement as it stands is out of the question, because it inherently lacks strength and increasingly lacks widespread recognition and observance.

A second possible conclusion about the current state of affairs is that the 1921 settlement is not just vulnerable but fatally damaged or obsolete. This conclusion is likely to appeal to those for whom the Church seems such a social irrelevance that its constitutional recognition is meaningless or even offensive. A religious organisation that has no greater merit than any other kind of voluntary organisation in the community does not deserve to have an apparently privileged locus in relation to the



law. This judgement will appeal also to people who are sympathetic to the calling and tasks of the Church but concerned that its institutional life obstructs its mission, or compromises its spiritual integrity. Christians who wish the Church were more of a loose movement and less of an organised piece of bureaucratic machinery may be attracted to a radical change in its constitution. The thesis rejects this somewhat defeatist conclusion. The vocation of the Church is to be called out from the world and, when necessary, to be distinctive and unconventional in its behaviour and beliefs. The argument does not accept the notion that the voice of God that commands the Church can only be heard through the conduit of the voices of secular authorities, and so it is not appropriate to abandon any kind of claim to be the Church immediately subject to the authority of Christ.

A further possible conclusion to this thesis would be something lying between the two extremes, lying on the spectrum between conservation of the *status quo* and revolution against it. There may be need only to heal any particular (but not mortal) wounds of the Church's constitutional state, by re-drafting parts of the settlement in a way that re-orientates the Church and the civil order more effectively. There may be a challenge to recover a tested theological model, or discover a new one, so that the Church is clearer about its social task and more confident about the source of its proper authority. This research uncovers elements of the relation of Church and nation in Scotland that do not work, and identifies the worst of these to be the jurisprudential framework of the 1921 settlement. The research recognises elements of that same relationship that are worth preserving, and identifies the best of these to include the survival of a widespread social and political recognition that the Church sometimes has to be able to express its unique function in the way it regulates its own life and beliefs.

This piece of research has followed one of two obviously possible approaches to the changing relationship of institutional religion and society in twentieth-century Scotland. This thesis focuses on the legal constitution of the national Church as it developed through the history of Scottish Protestantism. Though the method brings several disciplines together, the object of study is the Church in its governmental and juridical aspect. The alternative technique would be a much more sociological one, tracing the process of secularisation and the theories that explain its causes and effects, and analysing its effects on the Church of Scotland as an institution of

authority within Scottish society. The two projects would be quite consistent with each other, and might produce similar results. This thesis is confined to the first approach, because the internal scrutiny of the Church-state relation as defined from time to time by the civil law is sufficient to make the case for conceptual change that is argued here.

Some theological treatments of Church-state relations begin with an exegetical analysis of relevant Biblical passages, particularly the teaching in Romans chapter 13 about obedience to the civil authorities. For hermeneutical and contextual reasons this research does not include any substantial element of Biblical studies. As the latter part of Chapter One makes clear, the understanding of the relations between Church and state has been vastly different in different cultures and historical periods. If an ideal system of engagement between the ecclesiastical and the secular could be inferred from studying the Bible, it would have little to say about the particular circumstances of the Church in contemporary Scotland. In this thesis the Biblical witness is generally referred to because it testifies to the characteristics of the sovereignty of God, but no attempt is made to deduce from Scripture any technical conclusions for the constitutional law of the Church.

The main title of the thesis, *The Crown Rights of the Redeemer*, expresses a doxological premise. The belief, central to the Reformed theological tradition, of the eternal sovereignty of God over the Church but also over the whole world, is the starting-point. It would be perfectly possible to write an agnostically based thesis addressing the same questions as this one, but the absence of dogmatic theology – the doctrine belonging inside the community of faith – might produce quite different conclusions. This thesis teeters on the curious boundary between the philosophy of law and the theology of power and tries to avoid a commitment to one at the expense of the other.

# **CHAPTER ONE**

## **SOVEREIGNTY AND AUTHORITY – A REFORMED ANALYSIS**

This chapter attempts a general definition of the legal and intellectual concept ‘sovereignty’ and then classifies the principal ways in which it has been appropriated and applied in political science and Church-state relations. To the contemporary mind the generality of political science seems very different from the specialist discipline of Church-state relations, and there is no direct connection between some aspects of legal authority and the sovereignty of God over the Church. The legal relations between the Church and the world in which it is set have changed a great deal, however, in the period covered by this research. Church and state have at times been so tangled together, politically and legally, that it is not possible or appropriate to distinguish purely ‘secular’ or purely ‘sacred’ elements of the topic until the most recent times. The features, limitations and locations of sovereignty described in the following pages provide a classification of the characteristics claimed for sovereignty over many centuries, and that will be an important resource and lexicon of terms for the historical examination that will follow.

### **1. THE MEANING OF SOVEREIGNTY**

#### **The Definition of Sovereignty**

The legal concept ‘sovereignty’ has been described in so many ways and located in so many places, as this chapter demonstrates, that a simple definition can be only a point of departure, not a summary of the whole argument. Broadly speaking, sovereignty may be taken to be a quality of legitimate authority that is not subject to any greater authority, in other words the ultimate authority within the society or institution in question. Scholars have amplified this in various ways. The sixteenth-century Carmelite historian and lawyer Jean Bodin offered a five-fold list of the functions of the sovereign: appointing magistrates and determining their duties; ordaining and repealing laws; declaring and ending wars; hearing appeals



from the magistrates; and exercising the power of life and death where the law gave no provision for clemency.<sup>1</sup> The list suggests that the tasks of the sovereign power include routine elements of government but also extraordinary responsibilities at moments that are far from routine. Theories of sovereignty are particularly useful in assessing the non-routine periods in the life of a community, as this thesis will demonstrate in the life of the Church. Carl Schmitt, an admirer of Bismarck's, regarded sovereignty as the ability to decide when to exceed normal powers. Rational government deals only with normal circumstances, he pointed out, and so hardly demonstrates a uniquely authoritative competence. He preferred to ask:

‘Who is responsible for that for which competence has not been anticipated?’<sup>2</sup>

Schmitt was suggesting that the characteristic that sets apart a sovereign from some lesser kind of authority is the ability to determine who has what power, what is known in jurisprudence by Schmitt's phrase *competenz-competenz*, the legal competence to determine other powers' competences.

Another property is vital for a legal sovereign, and that is the ability to ensure that one's will prevails. Legal sovereignty, if necessary, must be able to wield sufficient coercive power to overcome challenges,<sup>3</sup> and sometimes the unanswerable force is the only realistic identifier of the sovereign power. Bertrand de Jouvenel, who wrote on power and sovereignty in the mid-twentieth century, described the exercise of this vertical power as the suppression of any alternative states that might spring up within the state and damage its internal network of social relationships.<sup>4</sup> The ability to compel the behaviour of others, by use of violence if necessary, is normally a necessary characteristic of a legal sovereign authority.

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<sup>1</sup> J. Bodin, *On Sovereignty: Four Chapters from 'The Six Books of the Commonwealth'*, edited and translated by Julian H Franklin (Cambridge: CUP, 1992), editor's introduction p. xvi

<sup>2</sup> C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 2<sup>nd</sup> edition 1934 translated G Schwab (Cambridge, Mass: MIT, 1985), p. 10. The dangers of acknowledging that sovereignty exists in a power that goes beyond any other authority become sobering when it is remembered that Schmitt became an admirer of the Third Reich, and eventually lost much of his academic respectability as a result.

<sup>3</sup> W.J. Rees, 'The Theory of Sovereignty Restated' in P. Laslett, ed., *Philosophy, Politics and Society* (Oxford: Basil Blackwell, 1963), p 67-8

<sup>4</sup> B. De Jouvenel, *On Power: Its Nature and the History of its Growth*, with preface by D.W. Brogan, translated by J.F. Huntington (from 1945 edition) (Boston: Beacon, 1962), p. 4-11

The general definition above may be described as the internal or vertical aspect of sovereignty, because it is entirely concerned with the relation between the highest authority and those inferior authorities and individuals subject to it. Regarded horizontally or externally on the other hand, sovereignty is the extent to which the supremacy of one sovereign power holds sway before encountering the presence and authority of another sovereign power. It is sovereignty as the extent of jurisdiction, whose most common political measure is geographical, with limits provided also through public and private international law, treaties, conventions and contracts, as well as wars and disputes that thwart the exercise of sovereignty claimed but disputed.

Writers on sovereignty have often used the spatial metaphor of the 'sphere' to describe the extent of a sovereign's authority, and it is a description associated with the Dutch Reformed theologian (and Prime Minister) of a century ago, Abraham Kuyper. This might describe a territorial area (e.g. Great Britain), but it might equally describe a community of people (e.g. the worldwide Jesuit order) or an area of life (e.g. the financial services industry). Inside the sphere the sovereign has supreme powers, and at the same time expects not to be subject to conflicting powers beyond that sphere: those are the vertical and horizontal aspects of their powers. This metaphor usually exemplifies a 'zero-sum' type of argument, as if human sovereignty is a fixed and quantified commodity that can be carved up between different competing authorities by contract or conquest, but cannot as a whole be enlarged, reduced or duplicated. In reality, though, human life is dynamic and always changing; new areas of endeavour develop (e.g. the internet) and new communities emerge (e.g. a new religion). The figures of authority and the sources of rules and protocols need not be in competition with existing sovereign authorities, and need not reduce their powers. In the mid-twentieth century, the jurisprudential writer Hans Kelsen criticised the concept of sovereignty judged in this horizontal manner. First, it normally divides sovereignty into artificial territorial pieces, whereas in reality some kinds of authority transcend nations; and second, it implies that there is really an invisible sovereign superior to the nation states (international law or the international community) and that does not fit a simple model of the state being a single unsurpassed authority.<sup>5</sup> This is where a spherical model of

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<sup>5</sup> H. Kelsen, *General Theory of Law and State*, translated A. Wedberg (Cambridge, Mass: Harvard University Press, 1945), p. 370

sovereignty is inadequate, but this research finds that it has been used frequently in understanding the Church as a legal institution, and that this has been to the Church's detriment as a spiritual organisation.

This thesis focuses on sovereignty because the Church of Scotland, since the Reformation, has consistently tried to acquire authority that fits the description above of complete power in a particular sphere (the spiritual life of Scotland) and subject to no interference from another sphere (the civil authority). One problem is the inadequacy of the particular, spherical, model of sovereignty; but another difficulty from the outset is that sovereign authority as described above is not the only kind of authority an institution may have. Many professions, associations, companies and voluntary organisations have some degree of internal regulation, but they are entirely subject to the civil law or to the regulation of other authorities and bodies too. This chapter explores with a theological awareness the characteristics of sovereign power, laying the foundation for an analysis of the history of Church and state in Scotland later in the thesis. This does not necessarily mean, however, that a Church's spiritual or temporal authority must be naturally or invariably 'sovereign', though this research finds that that was the presumption within the Church in the early part of the twentieth century.

### **The Limits of Sovereignty**

The horizontal aspect of sovereignty demonstrates that any sovereign power is likely to encounter external limits to its extent. There may also be limitations on the sovereign in its vertical exercise within the community. The kinds of vertical limits that may exist include the restrictions of religious duty to obey the Divine Law of God recognised in the Bible or from the Church; the law known in the middle ages as the *ius gentium* (the law of nations); and Natural Law.

Natural Law theory is the most common version of a theory of limited sovereignty: it is a strand of jurisprudence founded on the belief that some laws are inherent in nature or community and cannot be altered by any human authority, even a supreme one. The substantive beliefs of Natural Law theory have always included such axioms as appear in any system of law that has a category of self-evident propositions. Common examples are the immorality of incest, cannibalism or patricide, and so on.

Natural Law is the normative element of whatever objective truth *can* be reached by the exercise of human rationality, though it might *happen* to be delivered also by religious revelation alongside God's commands (Divine Law). The principal intellectual authority for this tradition of thought is the thirteen-century Dominican friar St Thomas Aquinas. In his magisterial work of theology the *Summa Theologiae*<sup>6</sup> he maintains that the sovereign is not exempt from the law,<sup>7</sup> and that the positive human law derives from Natural Law<sup>8</sup> by a process of reasoning he calls *synderesis*.<sup>9</sup> Natural Law is not just a restriction or mitigation of the effect of human rule, but it is the central positive influence shaping political institutions to benefit the whole people.<sup>10</sup>

Natural Law theory has been used to qualify many ideas of sovereignty.<sup>11</sup> Before the Reformation, the theory provided notions of restraint for temporal rulers aware that there was an authority higher than their own jurisdiction and sitting in judgement over them. The ideas of Natural Law theory were conveyed for their edification in a kind of writing known as '*Speculum Principis*', or 'Mirror of Princes' literature (by convention, singular in Latin and plural in English).<sup>12</sup>

In the writings of the Reformers, though a greater emphasis lay on the revealed law of God in Scripture, Natural Law was not forgotten. It was resorted to for example by George Buchanan, one of the intellectual leaders of the Scottish Reformation. To the extent that his *De Iure Regni Apud Scotos*<sup>13</sup> is an apologia for the removal of Mary Stuart's authority, it marshals arguments from history and Natural Law. To the extent that it is a work of secular political philosophy, it derives social unity also from Natural Law and builds upon it a compact between crown and

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<sup>6</sup> St Thomas Aquinas, *Summa Theologiae* 1a2ae, (London: Eyre and Spottiswoode, 1966)

<sup>7</sup> Question 96

<sup>8</sup> Question 91.3

<sup>9</sup> Question 94.1

<sup>10</sup> Question 95, and see editor's introduction generally.

<sup>11</sup> O. Gierke, *Natural Law and the Theory of Society 1500-1800*, translated with introduction by Ernest Barker, (Cambridge: CUP, 1958), p.37

<sup>12</sup> B. De Jouvenel, *Sovereignty: An Inquiry into the Political Good*, translated by J.F. Huntington (Cambridge: CUP, 1957), p. 200

<sup>13</sup> G. Buchanan, *De Iure Regni Apud Scotos*, (Edinburgh, 1579, facsimile edition Amsterdam: Theatrum Orbis Terrarum Ltd, 1969); for a translation see *De Iure Regni Apud Scotos: A Dialogue Concerning the Rights of the Crown in Scotland* (Edinburgh, 1799)

people. For Buchanan, society does not exist merely for purposes of utility, but it derives from God and serves the good as defined by God. The ruler of such a society does not have an arbitrary authority, because he or she has a duty to promote and restore the health of the social body, and must be qualified with the necessary abilities to fulfil that responsibility. The main constraint upon the king is law, which acts as a moderator upon his public actions, and to which he is ordinarily subject in his private capacity (that is, for purposes like property-ownership). Buchanan's is a thoroughly public-law model of monarchy, in which Natural Law controls the monarch's rule which is exercised through positive law.

For Jacques Ellul, a modern proponent of Natural Law theory, Natural Law had an important function in the transition from the medieval world to the classic state. It enabled the separation of Western law from Catholic religion and, in due course, the provision of common substantive beliefs that came to be enshrined in the positive law of nation states.<sup>14</sup> Natural Law is for Ellul the enemy of sovereignty, because it always serves to limit the otherwise free exercise of power: depending on the way in which sovereign power is exercised, limitations may be necessary.

In the struggle between the Church of Scotland and the civil power for authority over religious affairs, both parties were aware of the constraints on their own authority and on that of the other party.

## 2. THE LOCATIONS OF HUMAN SOVEREIGNTY

The shape of sovereignty is largely determined by its location, as that affects how it is exercised and regarded. Before the Reformation there developed two competing sorts of theory: hierocratic ideas which placed sovereignty at the point of ruler-ship and usually regarded it as conferred from above; and theories of popular sovereignty locating it within the general common weal which conferred authority on its ruler from within, or perhaps from below. In either event, sovereignty was regarded as deriving from God: in the former case as a divine right to rule, and in the latter as a divine authority to a people to select and empower its ruler.

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<sup>14</sup> J. Ellul, *The Theological Foundation of Law* (London: SCM, 1961), preliminary chapter (1)



## The Sovereignty of the Ruler and the Divine Right of Kings

The idea that the sovereign power in a community lies with the ruler, the person who wields day-to-day authority, is the political theory of monarchs and oligarchies that do not believe their authority has come to them from the people at large, or from any other authority within the community or beyond it. The theory has been articulated intellectually when it has come under attack from arguments contending that sovereignty belongs somewhere else. In the two centuries before the Reformation, this debate was joined within the Church, between the Conciliarist movement, that argued authority was derived from the community, and the Papalists, the traditionalists who countered them. The early sixteenth-century French theologian Jacques Almain was a proponent of Conciliarist theory,<sup>15</sup> and argued in his *Libellus de Auctoritate Ecclesiae*<sup>16</sup> that the community had a natural right to uphold the common good and to confer or recall political power. This version of the argument was to influence Scottish thinking in due course. In practice, however, the papal monarchy held sway against the growing power of the College of Cardinals and the ambition of secular princes.<sup>17</sup> The ecclesiastical setting of the pre-Reformation argument is instructive, because it demonstrates that a spiritual power may claim to be a sovereign ruler, and that is significant for post-Reformation Scottish history.

The Conciliarist controversy concerned the *spiritual* power of the papacy, and the question of whether the Pope should behave as a monarch without reference to other possible sources of authority. The Investiture controversy<sup>18</sup> concerned the *temporal* power of the Holy Roman Emperor and other European monarchs, and the question of whether that power was conferred by God through the Church. The twelfth-century rector of Paris University, Marsilius of Padua, argued in his *Defensor Pacis* that the state existed to facilitate the use of human powers to enable people to live well and in moderation, and that only the state – and not the Church – could

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<sup>15</sup> J.H. Burns, 'Conciliarism, Papalism, and Power, 1511-1518' in D. Wood, ed., *The Church and Sovereignty c.590-1918: Essays in Honour of Michael Wilks* (Oxford: Basil Blackwell, 1991), p.420

<sup>16</sup> J.H. Burns, *Lordship, Kingship and Empire: The Idea of Monarchy, 1400-1525* (Oxford: Clarendon, 1992), p. 140

<sup>17</sup> Wilks, *The Problem of Sovereignty in the Later Middle Ages*, p. 463-488

<sup>18</sup> Summarised in Wilks, *The Problem of Sovereignty in the Later Middle Ages*, Part Three

exercise coercive power, so the secular power is alongside but different from any spiritual power.<sup>19</sup>

Secular rulers, when they would no longer tolerate deriving their authority from the Pope,<sup>20</sup> could trace it instead directly from God as a divinely given right to be the monarch. Its main elements were (1) the belief that monarchy is a divinely ordained institution; (2) the belief that the hereditary right is indefeasible; (3) the belief that kings are accountable only to God and (4) the assertion that God enjoins passive obedience and lack of resistance by the subject.<sup>21</sup> By the ceremonial of kingship, the mystique built around it and its continuity, their sovereignty was credited with an atmosphere of the daimonic, a quality of indefeasibility and a presumption of accountability only directly back to its divine source.<sup>22</sup> This theory, known as the Divine Right of Kings, may constitute a claim for unlimited sovereignty or it may utilise a concept of final authority that is limited by law, Natural Law, personal responsibility or competing rights.

One Divine Right thinker who influenced Scottish political thought was Jean Bodin (1530-1596), whose writing informed the ideas of James VI.<sup>23</sup> Bodin, a member of the French Estates during the reign of Henry II, treated public law as a scientific discipline.<sup>24</sup> A contemporary of George Buchanan, Bodin could not conceive of a people being sovereign over their lord,<sup>25</sup> and concluded that a ruler so limited was not truly sovereign. For Bodin in his *De Republica*, sovereignty could not be limited 'in power, or in function, or in length of time'<sup>26</sup> and was logically

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<sup>19</sup> Marsilius of Padua, *Defensor Pacis*, translated and introduction by A. Gewirth (Toronto: University of Toronto Press, 1980), Introduction p. xxxii, lii and lv. The matter of the Church's exercise of coercive power is addressed towards the end of this chapter, when the Church is examined as *societas perfecta*.

<sup>20</sup> Some might be persuaded by the increasing distinction between the sacred and the secular, while others' objection would stem from their governing territories where the Reformation movement was strong.

<sup>21</sup> This is the statement of the theory given in J.N. Figgis, *The Theory of the Divine Right of Kings* (Cambridge: CUP, 1896) Chapter I

<sup>22</sup> C. Dawson, *Religion and Culture* (Gifford Lectures 1947), (London: Sheed and Ward, 1948), VI(3) and J.N. Figgis, *The Theory of the Divine Right of Kings*, chapter 1

<sup>23</sup> J.H. Burns, *The True Law of Kingship: Concepts of Monarchy in Early-Modern Scotland* (Oxford: Clarendon, 1996), p.226

<sup>24</sup> Bodin, *On Sovereignty*, Franklin's introduction p. xii

<sup>25</sup> *Ibid*, p.2

<sup>26</sup> *Ibid*, p.2

indivisible. Bodin's belief that monarchs were directly appointed by God produced the conclusion that the rights of the crown could never be relinquished or alienated.<sup>27</sup> A prince so indivisibly sovereign that he could not distribute his sovereign powers to others was nonetheless limited by Natural and Divine Law.<sup>28</sup> He was limited too by private positive law, in that he would inherit the private contractual obligations of his predecessor, like any heir, with no royal exemption from private bonds.<sup>29</sup> James VI, in his *True Lawe of Free Monarchies*<sup>30</sup> echoes Bodin's ideas when he talks of mutual duties of prince and people and stops short of a theory of absolutism. The historian of the Stuart age Glen Burgess concludes (like Bodin) that the divine right was considered in that era to be unconditional but not unlimited: unconditional in terms of human accountability but limited by Natural and Divine Law.<sup>31</sup>

Classic writing on sovereignty, like that of Harold Laski in the early twentieth century, regarded the Glorious Revolution of the late seventeenth century as a watershed time when the notion of absolute kingly right finally faded away.<sup>32</sup> Other accounts claim its continuing importance, especially in England during the Orange and Hanoverian dynasty, and as an ideal of High Anglicanism thereafter.<sup>33</sup> The theory of Divine Right, limited or not, remains a fiction in the ceremonial elements of modern monarchies, with religious elements in the accession or coronation of a new monarch. Its significance is its staying power in the imagination as one of the 'mystical preconceptions of sovereignty'.<sup>34</sup> As a model, divine right was a form of power claim<sup>35</sup> with more than one application, not just to monarchy. In the next

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<sup>27</sup> Ibid, p.49

<sup>28</sup> Ibid, p.13 and 31

<sup>29</sup> Ibid, p.43

<sup>30</sup> R.A. Mason, *Kingship and Commonweal: Political Thought in Renaissance and Reformation Scotland* (East Linton: Tuckwell, 1998), p. 216

<sup>31</sup> G. Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven and London: Yale University Press, 1996), p. 21

<sup>32</sup> H.J. Laski, *Political Thought in England: Locke to Bentham* (London: OUP, 1920), p. 20

<sup>33</sup> J.C.D. Clark, *English Society 1688-1832: Ideology, Social Structure and Political Practice during the Ancien Regime* (Cambridge: CUP, 1985), chapters 3 and 4

<sup>34</sup> R.M. MacIver, *The Modern State* (London: OUP, 1926), p. 438

<sup>35</sup> It was a claim to power based on a genuine belief in divine choice and appointment.



chapter, Scottish Church history will appear sometimes to consist of a struggle between the divine right of king and the divine right of the presbytery.<sup>36</sup>

### **The Sovereignty of the Ruled**

‘The conflict between the papacy and the conciliar thinkers was fundamentally one between the defenders of the idea of sovereignty in the ruler and those who sited it in the community at large...’<sup>37</sup>

Sovereignty has not always been seen as a quality only of rulers. In France, for example, the 1789 *Declaration of the Rights of Man* declared the principles of popular sovereignty to be ‘equality before the law, collective sovereignty of citizens of *la patrie* (nationalism), and the rule of law’.<sup>38</sup> Though sovereignty is not divisible, political power is conferrable, and a ruler may have received his or her authority ultimately from some or all of those ruled, who – according to this sort of theory – are truly the sovereign power. In the discussion below of theories of popular sovereignty, the concept of sovereignty will be located in places other than the powerful and those set apart to command.

The idea that sovereignty resides not with the ruler but in the community was (like the theory of ruler sovereignty) first articulated in an ecclesiastical setting. Marsilius applied the idea of popular sovereignty to the Church itself. He distinguished ecclesiastical and secular rule, but by crediting both with sovereignty that was ultimately popular, he succeeded in maintaining a single sovereign body in both spheres. In a society where membership of the Church was for all practical purposes universal, the indivisible sovereignty of God, conferred whole upon His people, created a sovereign populace that could devolve the power to rule upon chosen authorities for sacred or secular purposes. It is a theory with as much a divine mandate as the Divine Right of Kings, but here the route of conveyance of the power is thoroughly different, through the totality of society.

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<sup>36</sup> Dickinson’s intro to John Knox, *History of the Reformation in Scotland*, edited by William Croft Dickinson, 2 vols (Edinburgh: Thomas Nelson and Sons Ltd, 1949), p. liv

<sup>37</sup> Wilks *The Problem of Sovereignty in the Later Middle Ages*, p. 488

<sup>38</sup> R.W. Mansbach, and J.A. Vasquez, ‘Reassessing the Past: Global History from a Changed Perspective’ in *In Search of Theory: A New Paradigm for Global Politics* (New York: Columbia University Press, 1981), p. 337

Applying this same theory to secular rule, Aquinas used a threefold scheme of authority:<sup>39</sup> its *principium* was its ordination by God, its *modus* was determined by the people and its *exercitium* was conferred by them on their ruler or rulers. The kingdom of Scotland has always been notable for operating under a simple version of that principle. The title of her monarchs has traditionally been *rex scottorum* not *rex scotiae*, in other words king *of* the people, not king *over* a realm. The Declaration of Arbroath in 1320 made the same point in describing Edward as *rex Anglorum*, and asserted that Robert Bruce, as the king of Scots, ruled subject to the assent of the people.<sup>40</sup> The contrasting, English model of sovereignty was described by the Victorian economist and political theorist Walter Bagehot.<sup>41</sup> Bagehot argued that the Crown in Parliament was the location of sovereignty in the British constitution, and dismissed the notion that sovereignty was distributed among different institutions and authorities in Britain in the same way it was in a federal country like the United States. He believed that the ultimate authority was a newly elected House of Commons, and founded his constitutional theory on the principle of ‘choosing a single sovereign authority, and making it good’.<sup>42</sup> The difference in emphasis between the language used in pre-Reformation Scotland and the language of Bagehot is the question of whether the people doing the choosing can be said to be the ultimate location of sovereignty, or whether it lies only in the ruler so chosen.

The former, Scottish model was substantially the vision of Samuel Rutherford, whose *Lex, Rex*<sup>43</sup> was written in the covenanting ferment of the 1640s at around the time of the Westminster Assembly. For him there was no naturally self-evident form of rule, but authority came immediately from God and was mediated through the whole people. The divine origin of human power meant that any form of jurisdiction of one person over another was artificial and the product of positive law, not an inherent, God-given right. He retained a trace of Divine Right theory by

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<sup>39</sup> *Social Contract: Essays by Locke, Hume and Rousseau*, with introduction by Sir Ernest Barker (London: OUP, 1947), p. viii

<sup>40</sup> W.C. Dickinson, G. Donaldson and I.A. Milne, *A Source Book of Scottish History*, vol I (Edinburgh: Thomas Nelson, 1958), p 153

<sup>41</sup> W. Bagehot, *The English Constitution*, with introduction by R.H.S. Crossman (London: Collins, 1963)

<sup>42</sup> Bagehot, *The English Constitution*, p. 219-220

<sup>43</sup> S. Rutherford, *Lex, Rex: A Dispute for the Just Prerogative of King and People* (Edinburgh: Ogle and Boyd, 1843), Question II

maintaining that the people carry out God's choice in establishing their government,<sup>44</sup> but in doing so they gather the sovereignty that is scattered among them and transfer it to a single person, or parliament or political authority of some kind.<sup>45</sup>

‘May not the sovereign power be eminently, *fontaliter*, originally and radically in the people? I think it may and must be.’<sup>46</sup>

Rutherford's vision was the transfer of a fiduciary dominion (an authority entrusted by the people to a chosen ruler), not a masterly nor an absolute one (assumed or imposed by a ruler). The people did not give up their liberties: the powers of the king extended only to the execution of his responsibilities and not to the arbitrary compromise of his subjects' liberty.<sup>47</sup> To the people he credited a power of government (i.e. the appointment of it), but distinguished it from the power of governing, which belonged to the ruler once established.<sup>48</sup> In this respect, Rutherford's theory is characteristically Scottish, free of any sense of the inherent superiority of the ruler. He pointed out that the people could not confer any power above the law, since they did not have such unqualified power themselves. If the ruler then risked acting as if he were above the law, he could do so only in the service of the *salus populi*, and subject to the people's approval.

The discussion so far has addressed the ownership and conferring of sovereign power. An important argument within popular sovereignty theories was whether the people could revoke their action, recover their own power and reinvest it elsewhere. Whenever a people were in conflict with their ruler, their residual power to retrieve their original authority was an important matter.

A medieval dispute raged over the question whether the *lex Regia*, as it was known, was an irrevocable conveyance or a revocable delegation of power.<sup>49</sup> Marsilius, for example, believed that the popular conferring of sovereignty upon a

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<sup>44</sup> Ibid, Question IV

<sup>45</sup> Ibid, Question VII

<sup>46</sup> Ibid, Question XIX p. 86

<sup>47</sup> Ibid, Question XVI

<sup>48</sup> Ibid, Question VIII

<sup>49</sup> O. Gierke, *Political Theories of the Middle Age*, translated with an introduction by F.W. Maitland, Cambridge: CUP, 1900 reprinted in Key Texts series (Bristol: Thoemmes, 1996), p. 150 notes 158+159

ruler was retractable. Likewise, the Conciliarist Jacques Almain (who was taught by the same teacher as George Buchanan) believed that kings held power communicatively from the people, but that sovereignty was only delegated, not alienated. Those monarchs who believed in the Divine Right of Kings, on the other hand, could not countenance such a revocation argument, because they did not believe the sovereignty they exercised was the people's to retrieve, but it was given to kings by God who alone could remove their power by death or conquest.

The answer to the disputed point was important for the Reformers who were leading popular revolutions and frequently had to face the question whether the civil authority could be opposed, ignored, resisted or even overthrown. The Biblical record seemed to support the theory of the Divine Right of Kings, not least in Romans 13, so Knox and others had to find a way to be faithful to Scriptural authority without thwarting the enterprise of reform. In the Wars of the Reformation, Lutherans were forced to develop theories of resistance against the Catholic Emperor, arguing that the relationship amongst the Empire's ruling Electors was a contractual one and that as fellow magistrates they had the right to replace secular authority.<sup>50</sup> As far as ordinary people were concerned, the prevailing teaching until the mid-1550s was that the only right was passive resistance to the commands of evil rulers. Bodin believed it was not legitimate to resist even a wicked prince, though the subject should refuse to obey any command contrary to the laws of God or nature.<sup>51</sup> There was no avoiding the punitive consequences of disobedience of a ruler, even where the disobedience was morally inspired and the ruler was wicked. God had appointed the ruler; so all vengeance was left to God.<sup>52</sup>

As spiritual power passed back and forth between ecclesiastical and civil authorities in post-Reformation Scotland several times, each side behaved as if it was legitimate to prise power over the Church away from the other, to recover authority they each believed was fundamentally theirs to exercise.

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<sup>50</sup> Q. Skinner, *The Foundations of Modern Political Thought*, vol II (Cambridge: CUP, 1978), p. 230

<sup>51</sup> Bodin, *On Sovereignty*, Book II ch V p.120

<sup>52</sup> Dickinson's introduction to Knox's *History*, p. xl

## The Sovereignty of the Individual as Right-Bearer

The theories of sovereignty that recognise limitations on the powers of rulers normally include amongst those limitations the rights and privileges held by individuals. Some individual rights prevail against almost any other kind of legal claim. A society that recognises rights is one that regards the interests of the common weal as served by the protection, at any cost, of certain individual interests above the will of the majority.<sup>53</sup>

This is true of even simple societies, if they observe the principle of private property. The individual enjoys the *ius in re* (the right is located in the legal interest in the property) which by force or legal authority is exercised *ad personam* (against another person). The feudal system is little more than a multi-dimensional network of such rights operating under a communitarian model of law that did not yet recognise more sophisticated, inherent personal rights.<sup>54</sup>

With the humanistic jurisprudence of the twelfth century onwards, the individual became the basic unit of legal activity<sup>55</sup> and subjective rights *in persona*, rights that are the property of the individual and not attached to property or legal relationships, were recognised. These were the kinds of rights argued for by the Franciscan friar William of Ockham in the early fourteenth century. Sometimes rights have been regarded as inherent, natural and self-evident; and this view of rights is a branch of Natural Law theory. Otherwise rights have been seen as artificial legal advantages, albeit desirable ones, that are conferred by positive law or political authority.

After the Reformation, rights came to be a starting-point of political reflection.<sup>56</sup> One view equated the liberties of the citizen with the possession of sovereignty. De Jouvenel, for example,<sup>57</sup> described liberty as a kind of personal sovereignty that works as if the individual is in the centre of a circle surrounded by

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<sup>53</sup> De Jouvenel, *On Power*, p. 256 explains that such individual liberties must always be in conflict with a theory of sovereignty, even when that is located in the people.

<sup>54</sup> H.J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Emory University Studies in Law and Religion), (Atlanta Ga: Scholars Press, 1993), ch 11

<sup>55</sup> B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1550-1625* (Emory University Studies in Law and Religion), (Atlanta Ga, 1997), I.II

<sup>56</sup> *Ibid*, ch I.II

<sup>57</sup> De Jouvenel, *Sovereignty*, p. 258



other people in their circles. The touching radii of different circles are the legal relationships between persons and the circles are imperfectly round wherever the sovereignty of another limits an aspect of personal liberty. One's right trumps all else, and gives one what MacCormick calls a sphere of sovereignty.<sup>58</sup> This does not comprise a strong theory of duties, since it treats them as nothing more than an absence of right, or the compromising of a personal liberty. This is the model of sovereignty as a sphere of unassailable power (already described), but here it is attributed to each individual. Every human has, for this purpose, a spherical bundle of personal rights and can use it to trump any lesser kind of legal entitlement or possession; and these rights constitute a fundamental constraint on the jurisdiction of the recognised sovereign of the community. Furthermore, the spheres must sometimes collide when the interests of their different individuals cannot be compatibly accommodated. Hans Kelsen's complaint, about the fragmented nature of sovereignty defined horizontally in terms of competitiveness, would apply to this version of sovereignty theory.<sup>59</sup>

An alternative model distinguishes rights from sovereignty. Sovereignty theories that locate sovereignty in the ruler or in the whole body of the ruled community suppose that there is an authority that prevails over the rights of the individual, though such a sovereign may have an obligation to promote those individuals' rights. Rights exist, but they do not rely on the sovereign authority of their bearers: instead they are protected by the external powers of authority and government that are called 'sovereign', and those powers preserve the physical security of their subjects, administer justice, and determine and guarantee personal rights for everyone. Rights are recognised as very high-ranking legal claims, and their guarantee has a priority amongst the tasks of the sovereign. In this model, however, individual rights are not trump cards in conflict with each other or claimed against a sovereign power. They cannot be, because choices have to be made amongst conflicting interests, and political society cannot operate if every individual citizen believes his or her rights are supreme over everyone else's.

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<sup>58</sup> N. MacCormick, *H.L.A. Hart* (Jurists: Profiles in Legal Theory series), (London: Edward Arnold, 1981), p. 89

<sup>59</sup> Indeed, this version of the theory taken to its logical extreme focuses sovereignty entirely in what the individual is able to claim as his or her inherent right and entitlement. This is scarcely different from the descriptions of the original state of humanity sketched by Social Contract theorists like Locke and Hobbes

The real power of the model of subjective rights is its practical assertions: that democracy must be more than the prevalence of the will of a majority, that the civil magistrate has to take people's rights into account, and that justice cannot be dispensed or disposed by anything so partial as a vote. Bertrand De Jouvenel qualified the idea of democracy in this way:

‘Liberty of opinion is the basic principle of the political institutions of the West. It is an obvious mistake to regard majority decision as the criterion of the regimes which we call ‘democratic’. So far from massive majorities in favour of a government and its policy giving us a feeling of the excellence of a regime, they render it suspicious to us...’<sup>60</sup>

The attraction of natural rights theory is its protection of the interests of tiny minorities against the ‘tyranny of the elected majority’<sup>61</sup> and the persecution of the unconventional few. If the identity of protected rights is determined democratically, the majority may simply resolve to disregard a minority group and give it no protection at all.

Later in this chapter, the sovereignty of God will be discussed. The second of the rights models is more consistent with the Reformed belief in the constant sovereignty of God over the world and the Church. If relationships between people are viewed in the light of their mutual relationship with God, the billiard-ball image of independent spheres of sovereignty is inadequate because it does not describe a relationship that is communal or to any extent spiritual. Later in this thesis, the perceived human right of religious adherence will be examined in the context of the contemporary situation of the Church of Scotland. The important question will be whether those rights might provide the Church with a useful form of sovereignty, located in its membership, for spiritual purposes.

### **The Sovereignty of Society, and of the State**

Popular sovereignty places the supreme political focus on a large number of individuals. For some purposes, especially political and religious ones, the recognised ‘actor’ is a group of people and not its constituent individuals. The medieval debates addressed the question whether the people was a single, organic

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<sup>60</sup> De Jouvenel, *Sovereignty*, p. 276; MacIver, *The Modern State*, p. 10

<sup>61</sup> T.F. Torrance, *Juridical Law and Physical Law: Towards a Realist Foundation for Human Law* (Edinburgh: Scottish Academic Press, 1982), p. 13

whole in the same corporate manner for political purposes as for religious ones (as the Body of Christ), or whether it was a collective retaining all the characteristics of the individuals within it.<sup>62</sup> At a philosophical and legal level the answer was not clear, though group life of many kinds was commonplace in the Middle Ages, in religious orders, trade guilds etc. Were people able to associate in a way that produced a corporation that was something other than the sum of its parts? Was that association irrevocable, so that individuals once committed to each other were forever bound to that particular form of society? Did the sovereignty of the people belong to a loose confederation or to a single personality? How would such a corporation operate: how would it decide its own will and welfare, and what would become of those who belonged to a minority of opinion or circumstance? How would it exercise sovereignty, and how confer power?

For as long as constitutional thinkers have regarded political society as a complex and human institution (in other words, since the Renaissance), the concept of 'the state' has been the inclusive term to describe the political machinery of the nation. Two ways of understanding the state have to be distinguished, which parallel the two ways of regarding rights, described in the previous section. Just as one model of individual rights regarded their bearers as sovereign to the extent of having and wielding the rights, while the other model preferred to regard the sovereign power guaranteeing the rights as lying somewhere other than in their individual bearers; the same difference is found in the two models of the state.

One definition<sup>63</sup> regards the state as being sovereign, because it concentrates all power in its own hands and rules, without superior, over the people who live within its geographical jurisdiction. This definition distinguishes the state from the ruler, because the former is a legal entity that is not limited to the extent of the personal authority of the monarch and is able, therefore, to reach further with an ever-increasing machinery of law or coercion. It also attributes national sovereignty to the state, which provides its moral legitimation and political supremacy. When the essentially private, feudal power of medieval rulers was transformed by the

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<sup>62</sup> Troeltsch's essay in Gierke, *Natural Law and the Theory of Society*, p. 206

<sup>63</sup> Using the description by M. van Creveld, *The Rise and Decline of the State* (Cambridge: CUP, 1999), p. 416



appearance of a public, legally legitimated, sovereign authority, civic loyalty was directed to something other than the personality of the monarch.

‘... an authority *de facto* becomes an authority *de jure*, when a convention intervenes to supply the loss of personal loyalty.’<sup>64</sup>

The earliest expression of the state as a single personality appears in Marsilius’ *Defensor Pacis*<sup>65</sup> of 1324 where he defined the efficient cause of the state as the soul of the whole body of citizens. This provided a mystical solution to the problem of the basis for common action of citizens in establishing, correcting and deposing of a ruler. The language of ‘soul and body’ was used in due course by Hobbes,<sup>66</sup> who described sovereignty as the soul of the state.

As early as Machiavelli, an overemphasis on the coercive element of the state exalted the instrument above its function<sup>67</sup> – the state began to be treated as if it were an end-in-itself. (The pathological extreme of such exaltation is the totalitarian state which is not only an end-in-itself, but also the end and purpose of everything and everyone within it.) The new kind of legal authority extended over the whole territory of the nation-state and ruled it by public laws not private contracts. Its multiplication of enactments of positive law weakened the authority of Natural Law and Divine Law, and this process was encouraged with the strict separation of the secular and the religious in Lutheran-inspired political thought.<sup>68</sup>

The other main use of the word ‘state’<sup>69</sup> does not claim that it is a thing, or end, in itself. It is merely a term for the recognition of the existence of ordered government and law within some territory, and the relative independence of that government from outside interference. This theory of the state regards it not as an organic thing in itself, but as the shape and framework of political life, a matrix upon which the law is arranged and the apparatus of the country’s bureaucracy.<sup>70</sup> The

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<sup>64</sup> De Jouvenel, *Sovereignty*, p. 77

<sup>65</sup> Marsilius of Padua, *Defensor Pacis*, I.xv.7

<sup>66</sup> T. Hobbes, *Leviathan: or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (Oxford: Basil Blackwell, 1946), introduction p. 5

<sup>67</sup> MacIver, *The Modern State*, p. 431-2

<sup>68</sup> J.N. Figgis, *From Gerson to Grotius 1414-1625* (Cambridge: CUP, 1916), Lecture I

<sup>69</sup> This time using the description by H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), p. 216

<sup>70</sup> Kelsen, *General Theory of Law and State*, p. 182-5

network of social relationships that makes up political and social life is served by legally recognised structures, but those are integral to national life, not sovereign over it.

‘... the State, in this sense, is above all things, not a number of persons, but a working conception of life.’<sup>71</sup>

Bertrand de Jouvenel, talking of justice, described it as ‘a certain configuration of things in social geometry’. In this thesis ‘social geometry’ is understood to be the framework of the state in this second sense of the term.

These theories have mainly been articulated since the Second World War, when the pathology of an absolutist state, acting without constraints or the limits of Natural or Divine Law, fulfilled earlier fears about the totalitarian model of the state as itself a sovereign power. For example, the theologian Emil Brunner’s writings on justice emerged partly out of a horror of a state absolutism that rendered everything else relative.<sup>72</sup> If a state is not a *rechtsstaat* (law-state), if it is subject to no external standards of objective justice, its internal decisions are nothing more than expressions of personal preference without any independent means of judging between them. Brunner conceded that the state was necessary to regulate community though he believed it was imperfect because of its inevitable resort to coercive power. For Brunner, the authority of the state was not composed of the individual liberties of its members sacrificed for social ends in a Lockean contract model; members of society submitted to the discipline of the state in exchange for its protection by a kind of contract which did not absorb existing individual rights.<sup>73</sup> This theological vision countered the sinister promotions of state primacy that Brunner detected around him.

Even more recently, the notion of the state as a framework of social geometry, rather than as a sovereign power, has been supported by writers who narrate the mutation, diversification or fragmentation of old nation states and the emergence of other shapes or sources of power in a global society. For example, Samuel Huntington’s *Clash of Civilizations* provides a narrative of re-alignment as

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<sup>71</sup> B. Bosanquet *The Philosophical Theory of the State* (London: Macmillan, 1958), p. 140-1

<sup>72</sup> E. Brunner, *Justice and the Social Order* (London, Redhill: Lutterworth, 1945), chapter 1 (Introduction)

<sup>73</sup> *Ibid*, chapter 10

the 180-plus states of today lose elements of their sovereignty and come to be replaced in importance by seven or eight major civilizations, in ways that echo ancient empires and civilisations.<sup>74</sup> These may be characterised by religion or race, but the clash of cultures and religious systems is as important as the clash of political ideals has been in the past.<sup>75</sup> In some cultures, there has been no equivalent of the fading of the ideal of Christendom, so that in Islamic states, for instance, social care is built directly on religious principles that shape political decisions.<sup>76</sup> For Huntington the controlling criterion of communal self-assertion is often religion: a cultural alignment means more to people than an administrative one, and the restless urge to recast state borders is often strongest in places with a strong religious influence or revival. A sign of this motivation for change is a situation where the official law of the state does not correlate with the moral and legal intuitions of its people.<sup>77</sup> Either the law is imposed by force and re-education, or the political network is reformed. Neither of these two outcomes indicates a stable society.

Religious and supra-social boundaries are not the only parameters of secular sovereignty.<sup>78</sup> Globalisation and technology force the reconfiguration of sovereignty because technological activity overlaps conventional physical boundaries and decentres the vertical and horizontal relationships of political institutions. E-commerce, international popular culture, offshore companies and many other contemporary phenomena put in question traditional claims that a monolithic nation-state really has total legal powers of regulation. Saskia Sassen<sup>79</sup> describes this as a reconfiguration not a removal of sovereignty, with the erosion of the state in favour of the individual. This is reminiscent of the medieval state-less pattern of multiple allegiances and private commitments in a non-territorial framework under the feudal system. In the contemporary world, the single person may submit to different authorities for different purposes, and this is quite the opposite of totalitarianism.

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<sup>74</sup> Huntington, *The Clash of Civilizations*, p 36

<sup>75</sup> Ibid, p. 54

<sup>76</sup> Ibid, p. 111

<sup>77</sup> Berman *Faith and Order*, chapter 20

<sup>78</sup> MacIver, *The Modern State*, p. 469

<sup>79</sup> Sassen, *Losing Control?*, p. 14

The territorially bounded community need no longer confer an all-purpose sovereign power to a single ruling authority.

This thesis examines the relations of two types of ruling authority in the peculiar context of Scotland and Calvinism: one is the traditional state acting as the civil magistrate and the other is a different kind of authority within the same territory, i.e. the Church. The point at which those two authorities have been most clearly distinguished was at the passing of the 1921 Act, and the later focus of this research is that moment and its repercussions.

### **The Sovereignty of God**

‘Where God is truly known, man ceases to be lord over himself and his determining and willing take place no longer through his own freedom but in the freedom of the Holy Spirit.’<sup>80</sup>

Each of the theories of power and government so far considered involves the location of sovereignty somewhere in the human order. Hierocratic theories locate it with the power to rule, while popular sovereignty theories locate it in the ability to recognise and concede that power in others. Rights-based and other individualist theories, whilst not directly theories of political sovereignty, find an inalienable authority inherently within each human, while state theories abstract public sovereignty into the process or personality of the political system. Consequently, each of these traditional theories stands counter to a Christian assertion of the sole sovereignty of God, which is a primary theological and doxological foundation of Reformed Christianity.

‘There is only one limit to the sovereignty of the State; it is the knowledge of the sovereignty of God.’<sup>81</sup>

Located in God, sovereignty is self-evidently non-negotiable and inalienable. It is an aspect of Providence and of the divine rule. It is absolute, because God is subject to no greater power, but it is not arbitrary,<sup>82</sup> because God acts true to other attributes of divinity: to the faithful, the sovereignty of God is fulfilled in predictable and lovable ways. To the Christian believer all human powers are subject to the

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<sup>80</sup> K. Barth, *The Knowledge of God and the Service of God According to the Teaching of the Reformation: Recalling the Scottish Confession of 1560* (The Gifford Lectures 1937 and 1938), translated J.L.M. Haire and I. Henderson (London: Hodder and Stoughton, 1938), p.115

<sup>81</sup> Brunner, *Justice and the Social Order*, p. 189

<sup>82</sup> De Jouvenel, *Sovereignty*, p. 210

sovereignty of God, though an atheist with power will not be conscious of being so constrained. Since this thesis, above all, asks how the sovereignty of God can be honoured by the Church in its relations with the civil order, the characteristics of divine sovereignty are now explored.

### 3. THE MODE OF DIVINE SOVEREIGNTY

#### Diakonal Sovereignty

The sovereignty of God has an unexpected nature, characterised by service and love of the world and not by compulsion or coercion of behaviour. The Biblical record of the covenants of God and people do not present a sovereignty based on coercion or sheer power. In the experience of Noah, Abraham and Moses, and through Christ, God loves and serves the world and the people of God within it. The self-giving of God is greater than the demands of God. God who is Sovereign is God who is Love. This Christian model of sovereignty is thoroughly unconventional because it locates sovereignty in the place of love and covenant, in the service of the infinitely loved world. It is Sovereignty of the servant, Diakonal Sovereignty.<sup>83</sup> Diakonal Sovereignty commands by attraction not compulsion. It is the ultimate expression of 'soft power', a cultural appeal that wins consent, in contrast to 'hard power', a manipulation of economic or military power to command.<sup>84</sup> It is Oliver O'Donovan's 'objective correlate of freedom',<sup>85</sup> because it does not compromise the freedom of its subjects, unlike humanist versions based ultimately on coercion.

The Scottish contemporary theologian Ruth Page builds her Christology on the idea that God is 'with' us alongside, and is not a commanding power above us.<sup>86</sup>

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<sup>83</sup> A technical term is devised here, to carry understood distinctions and criteria from this chapter into the analysis contained in the following ones. It reflects the contrast between *diakonia* and *arche*, which the canon lawyer Josef Blank describes as characterising the New Testament understanding of power. J. Blank 'The Concept of 'Power' in the Church: New Testament Perspectives' in J. Provost, and K. Walf, eds, *Power in the Church* (Concilium vol 197) (Edinburgh: T+T Clark, 1998), p. 8. 'Diakonal' is here spelled with a 'k', to avoid confusion with 'diaconal', relating to an order of ministry.

<sup>84</sup> Huntington, *Clash of Civilizations*, p. 92

<sup>85</sup> O. O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: CUP, 1996), p. 30

<sup>86</sup> R. Page, *God With Us: Synergy in the Church* (London: SCM, 2000)

Using metaphors like parenthood, friendship and especially companionship, Page resists the idea of the sovereignty of God being a claustrophobic or dominating characteristic, but talks of God's friendship as an 'uncoerced concurrence'.<sup>87</sup> She also makes a theological remark that illustrates the point made earlier in this chapter about the artificiality of a 'fixed-sum', quantitative idea of sovereignty. Page describes a shift in the theory of power between a high Calvinist view (in which God has 100% of the power in a quantum calculation) and an Enlightenment view (in which humans have claimed more and more power, and God's seems almost to have disappeared).<sup>88</sup> She suggests that a more profitable model of the power of God is a relational, not a percentile one. Applying that Christological understanding to her experience of the Church, especially in Scotland, Dr Page criticises every example of 'top-down' authority within a rigid institutional denomination, and offers a renewed vision of spirituality, ecclesiology and missiology, all transformed by her distinctive image of the sovereignty of God.

Not only does this kind of diakonal sovereignty model transform the Reformed understanding of the sovereignty of God: it provides a revolutionary way to grapple with the powers of this world, including the powers of the Church. Walter Wink, an American New Testament scholar, is best known for his trilogy of books<sup>89</sup> on the powers of this world, what New Testament scholarship refers to as *exousia*. Especially in *Engaging the Powers*, Wink makes a similar argument to Page's, as he describes the artificial and arbitrary emergence of the system of domination as the method of ordering the affairs of the world and of the Church. Christ's purpose, especially the purpose of his execution, was to break the spiral of domination<sup>90</sup> –

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<sup>87</sup> Ibid, p. 24 Ruth Page's contention goes further than the argument of this thesis, because she criticises the use of conventional 'sovereignty' language applied to *God*, and so by extension to the Church. Without necessarily disagreeing with that conclusion of her theology, this argument does not go so far, and borrows her thought only to the extent that it removes sovereignty-language from application to the *Church*, because it is an unnecessary and unhelpful foundation of Christian freedoms.

<sup>88</sup> Ibid, p. 52-4

<sup>89</sup> W. Wink, *Engaging the Powers: Discernment and Resistance in a World of Domination* (Minneapolis: Fortress, 1992); *Naming the Powers: The Language of Power in the New Testament* (Philadelphia: Fortress Press, 1984); *Unmasking the Powers: The Invisible Forces That Determine Human Existence* (Philadelphia: Fortress Press, 1986)

<sup>90</sup> Wink, *Engaging the Powers*, Chapter 6



Wink describes the destruction of Jesus as a 'divinely-set trap'.<sup>91</sup> His programme for the Church (in relation to the world's powers) is as follows:

'... to unmask their idolatrous pretensions, to identify their dehumanizing values, to strip from them the mantle of respectability, and to disenthral their victims... What the church can do best, though it does so all too seldom, is to delegitimize an unjust system and to create a spiritual counterculture.'<sup>92</sup>

It is not the task of this piece of research to explore or extend the work of people like Page and Wink, and many others like them, in the field of 'exousiology'. However, the narrative of the following chapters will trace a historical path through periods when the domination model was prominent in the engagement of Church with state, but it will arrive at the kind of questions these new theologies have asked about the Church and will try to imagine diakonal sovereignty as informing the future of Church-state relations in Scotland.

### **Sovereignty in Covenant Relation**

The exercise of this divine sovereignty amongst the human subjects of God is, for Reformed theology, the function of covenant between God and people. Retaining sovereignty at all times, God has from time to time delivered a promise and a command together, as received by Noah, Abraham and Moses. In the language of jurisprudence, these were not contracts because there were not two negotiating parties. Covenant is the medium of the sovereignty of God. To a covenanted people is delegated<sup>93</sup> responsibility, authority and God's Word, and through them God's ministry is delivered to the world. Sovereignty is inherent only in the divine; its exercise is delegated to humans and delegated variously for temporal or spiritual functions.

Reformed Christianity, especially in Scotland, acknowledges the idea of this special kind of compact in which God is one of the parties. A 'covenanted nation' was one conscious of such a relationship and guided by its implications; this provided substantive direction for political leadership, and it had the capacity to

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<sup>91</sup> Ibid, p. 140

<sup>92</sup> Ibid, p. 164-166

<sup>93</sup> D.B. Forrester, 'The Political Teaching of Luther, Calvin, and Hooker' in Strauss, L. and Cropsey, J., *History of Political Philosophy* (Chicago: Rand, McNally and co, 1963), D.1

impose the values of the Gospel on secular decision-making, in what is known as ‘confessional politics’.<sup>94</sup> In the years immediately preceding the Scottish Reformation, Knox believed that England was a covenanted nation but Scotland was not yet covenanted. He believed that Scotland could be won for the Reformation cause only by gradual change, beginning with the people’s self-reformation spiritually and culminating in national change. The same principle appears in Rutherford’s *Lex, Rex*, which describes the bilateral political relationship of king and people against a background of the relationship each has spiritually with God.<sup>95</sup>

Christians, especially Reformed ones, talk about ‘covenant’ to express the belief that God’s will is sovereign. The language of covenant often conveys the sense that its human parties are subjects of an initiating Providence, so that the covenant is not of people’s choosing but imposed upon them as an aspect of their Christian belonging. One implication of that is that God does not relate to people through negotiated contracts but sets the terms of his providence. Another implication is that God declares a covenant without waiting for the people to decide whether they will enter it too; he is prevenient with his grace and not constrained by the need for his initiative to be accepted by his human creation. The sovereignty of God so expressed puts into question the validity of any other, lesser, secular sovereignty, and all constitutional explanations that are consistently humanistic.<sup>96</sup>

The theological development of the concept of the covenant after the Reformation is discussed in Chapter II, as is its use as a philosophical basis for the banding together of like-minded protagonists in the struggles in Church and politics that followed the Scottish Reformation. In any conflict, religion is unlikely to reduce

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<sup>94</sup> D.B. Forrester, ‘Radical Reformed Orthodoxy: Can It Be Retrieved?’ in *Truthful Action: Explorations in Practical Theology* (Edinburgh: T+T Clark, 2000) p. 161-184

<sup>95</sup> Rutherford, *Lex, Rex*, Question XIV

<sup>96</sup> The language of covenant is not a religious monopoly, and is useful for describing other, similar relationships in human society. In his version of social contract theory, Thomas Hobbes used the religious terminology of ‘covenant’ rather than the more neutral language of ‘contract’. He regarded the parties as the people on the one hand and the ruler (not God) on the other. In the act of mutual covenant the people surrenders not only the exercise of their natural rights, but the very rights themselves. Hobbes in his view of the state of nature did not see it constrained, as John Locke thought, by any element of Natural Law. For Hobbes, therefore, the raw state was one where each individual lived in a desperate and horrible sovereign (i.e. unruly) state. Consequently, the sovereignty of the society created by the covenanting of those individuals would be equal to the measure of that individual sovereignty each gave away. In the historical narrative of this thesis, the language of covenant usually appears where God is regarded as a party to a relationship; this theological application of the term is its most common use.

the intensity of the hostility, because all parties earnestly believe God is on their side. The concept of covenant made things worse in some episodes of Scottish history, because it gave certain parties the sense that they enjoyed an especially close relationship with God, and so it fuelled their fanaticism. It is important not to dismiss the reality of covenant relationship with God in the light of its abuse or disastrous outcomes in the past.

#### 4. SOVEREIGNTY IN CHURCH AND STATE

In this final section, some of the distinctions and definitions introduced so far will be recapitulated as the general theme of the rest of this thesis is reached: viz. the relations between the national Church and the civil magistrate in Scotland since the Reformation, seen as the assertion by each of legal sovereignty.

##### **The Historical Background, before the Scottish Reformation**

The development of a relationship of Church and state as two separate sovereign entities took place against the history of an ancient and very different understanding. The early Roman Empire and the Jewish world had no clear and developed concept of a distinction between civil and religious functions.<sup>97</sup> The view of society as a single whole was the self-understanding of the later Eastern Empire throughout its history and engagement with the post-Constantinian Church.<sup>98</sup> Belief in the single sovereignty of God predated any dichotomy between the civil order and the Church, so ecclesiology and political theory were virtually a single subject.<sup>99</sup> The group of theories that connect the Church and the civil order inherently or logically together are known as the concept of 'Christendom'. A society that is governed by the same authorities for religious and non-religious purposes displays a very pure form of Christendom theory.

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<sup>97</sup> A. Cunningham and M. di Maio, translators, *The Early Church and the State*, Sources of Early Christian Thought series (Philadelphia: Fortress Press, 1982), p.2

<sup>98</sup> Ibid, p.13

<sup>99</sup> J. N. Figgis, *Churches in the Modern State* (London: Longmans Green, 1914), Lecture II; Wilks, *The Problem of Sovereignty in the Later Middle Ages*, p.42

Almost as pure was the medieval era of the Holy Roman Empire, where there were separate secular authorities, but they organised temporal affairs in the interests of the greater whole and on behalf of the Church. Using the image of the spiritual and secular swords,<sup>100</sup> the Church claimed to hold *utrumque gladium habitu*, but to wield only the spiritual one *actu*.<sup>101</sup> Whoever enjoyed the secular power could hardly be described as a sovereign in any absolute sense: that power was being exercised only in the interests of the Church and, ultimately, for its sovereign God. In the early Middle Ages, therefore, single-sovereign Christendom remained the prevailing model, with non-spiritual powers delegated, in theory, to a civil ruler.

In about 1100, Justinian's *Corpus Iuris Civilis* had been rediscovered and the medieval civil law tradition centred in Bologna extended the distinctiveness of civil law from the *Corpus Iuris Canonici* of the Church.<sup>102</sup> The same Scholasticism that received and used the *Corpus Iuris Civilis* rediscovered also the teachings of Aristotle, and encountered the pre-Christian idea that the inherent nature of the human individual includes the ability to understand and regulate one's own affairs. Rationalism was a presumption of the quality of the individual mind; it contrasted with the prevailing doctrine of the external authority of the Church delivering truth and law.<sup>103</sup> This encouraged the idea that secular rule could be independent of the spiritual authority of the Church, even if it was still answerable to the sovereign God. The new alternative to the 'two swords' theory was a theory of 'two regimes', which recognised that there was still a single society, but maintained it had two earthly heads one of which was no longer the Church.<sup>104</sup>

Marsilius of Padua's doctrine of popular sovereignty has been described above. In the same work, *Defensor Pacis*, he articulated also the dismantling of any coercive power of the leaders of the Church because, he argued, the clergy cannot be

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<sup>100</sup> The image was first used by the fifth century Pope Gelasius in a letter to Anastasius II, cited in S.Z. Ehler and J.B. Morrall, *Church and State through the Centuries: A Collection of Historic Documents with Commentaries* (London: Burns and Oates, 1954), p.11. The Biblical reference is to the two swords mentioned in the narrative of the Garden of Gethsemane (Ehler p.91), and it was used by Henry IV in the letter summoning the German bishops to the Diet of Worms in 1076

<sup>101</sup> Gierke, *Political Theories of the Middle Age*, p. 14

<sup>102</sup> Berman, *Faith and Order*, ch II and H.J. Berman, *The Interaction of Law and Religion* (London: SCM, 1974), ch 3

<sup>103</sup> *Ibid*, p. vii

<sup>104</sup> Wilks *Problem of Sovereignty*. p. 75

responsible for the use of force.<sup>105</sup> Only Christ can punish spiritual offences,<sup>106</sup> and so the punishment of this world can only relate to matters of human law.

‘...Christ himself came into the world not to dominate men, nor to judge them by judgement... nor to wield temporal rule; but rather to be subject as regards the status of the present life; and moreover, that he wanted to and did exclude himself, his apostles and disciples, and their successors, the bishops and priests, from all such coercive authority or worldly rule, both by his example and by his words of counsel or command.’<sup>107</sup>

This was a further advance in the Church-state debate, because now the nature of the authority exercised by the two regimes was different. Not only is the Church’s lack of coercive force significant for the Church itself – and profoundly important for the later argument of this thesis –, but it has implications for the relationship between the two sorts of authority. If the Church needs to compel someone’s behaviour, it must either exercise a force Marsilius argued it does not have or it must apply for help to the civil regime. The question of whether and how the civil regime should support the life of the Church was one the early European Reformers tried to address.

In the political thinking of Martin Luther there is yet another development in the distinguishing of spiritual and temporal authority. For Luther the human individual was not a member of a single society with two heads, but of two distinct communities. The Church as the society of the elect was distinct from the secular society of the world, so the Christian belonged both to the kingdom of God (and in this life to the Church), and to the jurisdiction of the civil powers. Those powers had no spiritual remit and existed to keep order and suppress the worst of worldly evils, *propter peccatum*. The civil sphere was, as Aquinas and others had discovered, subject to the power of reason, and for Luther this meant that in it God could appear only behind a mask.<sup>108</sup> This was faithful to Augustine of Hippo’s notion of the state as a necessary evil, which Gilby describes as believing:

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<sup>105</sup> Ibid, II.v.7

<sup>106</sup> Ibid, II.x

<sup>107</sup> Ibid, II.iv.3

<sup>108</sup> F.E. Cranz, *An Essay on the Development of Luther’s Thought on Justice, Law, and Society* (Harvard Theological Studies XIX) (Cambridge, Mass: Harvard Theological Press, 1959), IV.1



‘... almost that a thief should be set to catch a thief, that evil should be treated homeopathically.’<sup>109</sup>

Both kinds of government belonged to God,<sup>110</sup> because the work of civil government had the potential to create the conditions for the preaching and advance of the Gospel. If the civil ruler were a Christian, he was a vice-regent of God’s and his task of governing was a Christian duty. In his hands was the only sword, i.e. the only power to coerce.<sup>111</sup> Indeed, for Luther, the Church was so removed from earthly power that he denied the validity of the *Corpus Iuris Canonici*;<sup>112</sup> human law was not a fitting tool for Christ’s Church because the Church was not the bearer of a sword.

This is known as Two Kingdoms thinking, where the ecclesiastical and secular authorities and communities are separately defined, albeit with overlaps and close connections inevitable between the two. It is slightly different from St Augustine of Hippo’s ‘two cities’ idea, contained in his *De Civitate Dei*, which described the city of God and the earthly city as contrasting communities. For Luther, on the other hand, the secular authority may or may not be in sympathy with the ends of the Church; and if it is sympathetic, the civil regime can only help to create conducive conditions for the Church’s own, entirely separate, work.

John Calvin’s understanding of the civil powers developed differently from Luther’s. In the Reformed view, the civil magistrate wielded his sword for the positive and direct benefit of the Church, not just against the world’s sins, and so civil law became a constructive means of religious reformation.<sup>113</sup> In the 1543 edition of his *Institutes of the Christian Religion*, he spoke of the ecclesiastical and civil powers working together in issues of discipline, but in different jurisdictions and with different purposes. However, by the 1559 edition he regarded the civil

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<sup>109</sup> T. Gilby, *Between Community and Society: A Philosophy and Theology of the State* (London: Longmans, Green and Co, 1953), p. 137

<sup>110</sup> *Ibid.*, IV.3

<sup>111</sup> Forrester, ‘The Political Teaching of Luther, Calvin and Hooker’, B.3. Ellul, *The Theological Foundation of Law*, ch III.3.a remarks that the content of the law is secular; all it can do in respect of religion is maintain a condition of openness.

<sup>112</sup> Berman, *Faith and Order*, ch 5(i)

<sup>113</sup> Figgis, *From Gerson to Grotius*. In lecture IV he regards this as a near-medieval wielding of the temporal sword for the good of the Church



magistrate as having a responsibility to protect worship, *pietas*, and the Church's status, and a duty extending to both tables of the law.<sup>114</sup>

‘For, seeing the Church has not, and ought not to wish to have, the power of compulsion (I speak of civil coercion), it is the part of pious kings and princes to maintain religion by laws, edicts, and sentences.’<sup>115</sup>

So where a Calvinist theology prevailed throughout a community, e.g. Geneva in his lifetime and Scotland in parts of the later sixteenth century, there was achieved a return to a model of two regimes over a single kingdom, very much like Marsilius' position of two hundred years earlier.

Metaphors of two cities, two swords, two regimes and two kingdoms are all different from each other; but they are all structures in which Churches have tried to locate God's sovereignty over the whole world, and to distinguish within it the regulation of matters of particular spiritual concern.

### **The Conceptual Background, of the Church as Community**

A great deal can be learned about the conceptual framework of the Church as a legal institution, by turning to the Roman Catholic Church and observing whether and how its canon lawyers balance ecclesiological considerations with juridical ones. In the course of the twentieth century, the *Codex Iuris Canonici* has undergone a dramatic transformation in its under-girding legal philosophy, and this has been charted by the Church's constitutional experts. The rest of this thesis examines the Church of Scotland experience in similar terms, so it is useful to borrow the language and pattern already analysed by others in respect of the older and larger Church.

The last hundred years have seen two versions of the *Codex*, one published in 1917 and the next in 1983, with the Vatican Council of the 1960s between the two. According to James Provost and Knut Walf, editors of a number of editions of the

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<sup>114</sup> H. Hopfl, *The Christian Polity of John Calvin* (Cambridge: CUP, 1982), p. 119-122, 172 and see Calvin, *Institutes of the Christian Religion*, IV.XX.9

<sup>115</sup> Calvin, *Institutes of the Christian Religion*, IV.XI.16

*Concilium* journal dedicated to Church law,<sup>116</sup> the two versions contained different ecclesiologies.<sup>117</sup>

The 1917 code assumed the Church was a *societas perfecta*, (a perfect legal institution) whereas the 1983 code is based much more on a sense of *communio* (the Church as a communion). The *societas* model originally arose out of the Catholic Church's confrontation with the Churches of the Reformation, and later with the modern secular state. The Church had to assert its autonomy, and defend a self-contained system to ensure its stability and legal integrity.<sup>118</sup> The flaw was that the argument claimed for the Church exactly what it resisted in secular society, so it exalted the operation and effectiveness of the institutional Church and emphasised its juridical functions above its ecclesiological or sacramental life. It developed a view of the Church structured by its hierarchical power of jurisdiction, and identified Christ with a legislator.<sup>119</sup>

The 1983 code was constructed in the light of Vatican II's shift back to a communion-based ecclesiology,<sup>120</sup> and it better balances the necessary elements of *societas perfecta* with the insights of the new understanding of the whole Church. *Communio* acknowledges the inseparability of all the constitutive elements that make up the Church when defining it, and is open to the possibility of change and development.<sup>121</sup> It emphasises Church order rather than canon law: in other words, it calls for the de-juridicising of theology and the de-theologising of the law.<sup>122</sup>

One example of the way in which the new model had immediate practical outcomes was a new emphasis on human rights under the Church law. Pope John Paul II gave to canon lawyers the task of defining for the first time the basic

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<sup>116</sup> J. Provost, and K. Walf, eds, *Canon Law – Church Reality* (Concilium vol 185) (Edinburgh: T+T Clark, 1986); *From Life to Law* (Concilium 1996/5) (London: SCM Press, 1996); *Power in the Church* (Concilium vol 197) (Edinburgh: T+T Clark, 1998)

<sup>117</sup> Provost and Walf, *Canon Law – Church Reality*, p.xi of the editorial

<sup>118</sup> R. Potz, 'The Concept and Development of Law According to the 1983 CIC' in Provost and Walf, *Canon Law – Church Reality*, p. 16

<sup>119</sup> K-C. Kuhn, 'Church Order instead of Church Law?' in Provost and Walf, *From Life to Law*, p. 30

<sup>120</sup> This is not a novel concept; but the Catholic Church was recovering a *communio* ecclesiology. According to Potz, *communio* could be traced back to 'koinonia' teaching in Aristotle and it featured in high Scholasticism and Humanism.

<sup>121</sup> E. Corecco, 'Ecclesiological Bases of the Code' in Provost and Walf, *From Life to Law* p. 3-13

<sup>122</sup> Provost and Walf, *From Life to Law*, p.viii of the editorial

Christian rights within the wider context of general human rights.<sup>123</sup> This was clearly a change of philosophy, away from a concentration on what power the Church was able to exercise over the faithful and towards the entitlements of the individual believer, even against the institution of the Church. Later in this thesis, the recent policy of the General Assembly of the Church of Scotland to identify human rights and bring them within the polity of the Church is noted. This is exactly the same process, a response to changing perceptions of the Church as a sovereign authority. The Roman Catholic experience has been touched on to provide useful linguistic tools for the later tasks of the research. It demonstrates that the ecclesial body must be spiritual, but there are different ways in which it may be a legal entity.

### **Presbyterianism and the Civil Magistrate**

The Scottish Calvinist tradition of Presbyterian Church government and relations with the civil magistrate is the context for the argumentation of this thesis; but Presbyterianism is a form of political philosophy that has often been troublesome for the civil magistrate. Writing before the passing of the 1921 Church of Scotland Act, the constitutional historian J.N. Figgis pointed out what he believed were the inherent dangers of this form of Church polity.<sup>124</sup> Taken to its logical conclusion, he thought, Presbyterianism would subordinate all state actions to ecclesiastical considerations,<sup>125</sup> ending logically in the return to a two-swords theory.<sup>126</sup> The English Presbyterianism he was familiar with was in some ways worse than the medieval Papal claims mentioned earlier; and so the purpose of the English version of the Divine Right of Kings was in part to resist Papacy and Presbyterianism alike.<sup>127</sup> There is in the Reformed tradition an attitude towards authority that anti-Calvinists like Figgis (and others long before him) have found simply alarming. It is a guiding principle in the reading of Scottish Church history that follows, and constitutes an unintended compliment to the Scottish Protestant outlook.

‘No person whatsoever, let him pretend never so much religion, sanctity, or innocence, can possibly be a good subject, so

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<sup>123</sup> See Kuhn in *From Life to Law* p. 33

<sup>124</sup> Figgis, *The Theory of the Divine Right of Kings*

<sup>125</sup> *Ibid*, p. 187

<sup>126</sup> *Ibid*, p.198

<sup>127</sup> *Ibid*, p.197

long as he continues a true Presbyterian or of their offspring; in regard they always carry about with them as the main of their religion such principles, as are directly contrary to monarchy and destructive of loyalty; to which he can never be a firm, true and assured friend who owns a power superior to that of his prince within his dominions; and that such a power may of right depose him, and take away his crown and life, which has been proved to be the avowed doctrine of the consistorians of Geneva, Scotland, and England, both in point and practice.<sup>128</sup>

## Conclusion

This chapter has demonstrated how profoundly different is God's sovereignty from the legal sovereignty of the world's political institutions. Observed phenomenologically, sovereignty appears to be a property of human political relationships, though within that definition it may be regarded in different ways or identified in different places. According to some definitions sovereignty is for all practical purposes unlimited by any higher claims; and according to others it is subject to religious or moral limitations. According to some emphases sovereignty is exercised primarily over subordinates; and according to others it is mainly used to define an area of jurisdiction against competing power-claims. According to some articulations sovereignty is the natural property of the natural ruler; according to others it is the legitimation given to rule by those who subject themselves to it; according to another viewpoint it is first and foremost the moral authority of the individual; and finally some identify it belonging to the whole people as a collective institution.

This thesis makes, as its first assertion, the claim that a theologically-motivated analysis of sovereignty cannot regard it as a human institution, but must begin by remembering that sovereignty belongs to God as a divine characteristic, and can belong to any human institution only derivatively. Because of this premise, the tradition of Reformed theology has always concluded that the sovereignty of God extends over all earthly institutions of authority whether they recognise it or not; and that profoundly affects the view of Church-state relations that can be maintained.

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<sup>128</sup> Figgis, *Divine Right of Kings*, p. 283-4, quoting John Nalson, *Common Interest of King and People: shewing the original antiquity and excellency of Monarchy, compared with Aristocracy and Democracy, and particularly of our English Monarchy, and that absolute, papal, and presbyterian popular supremacy are utterly inconsistent with prerogative, property and liberty* (1677). Nalson was a staunch Royalist and defender of the Church of England during the revolutionary period in mid-seventeenth century England.

This chapter has further observed that the qualities of the divine sovereignty – and of the Church community in obedience to that sovereignty – are understood today in ways that are very different from conventional political theories of sovereignty and power. Models of power, force and compulsion, for example, are spurned by much contemporary theology. So using the language of ‘sovereignty’ is risky for the Church, because it is all too easy to slip from it into the language and secular concepts of overwhelming power and legal coercion. Instead, the Reformed ideal should be to claim words like Nalson’s<sup>129</sup> (even though they were meant as an insult), and so to maintain a rigorous and faithful distinction between temporal and spiritual duties of obedience.

The following three chapters follow, in chronological order and in outline, the post-Reformation Church history of Scotland, using the tools of analysis employed in this chapter to explore the constitutional science of each major event or period. Three questions will be relevant: (1) Did the Church of Scotland appear to aspire to be a legally sovereign body: was it ever right to do so and did it succeed? (2) Did the Church heed the proper limits of sovereign power described above? (3) Did it observe the distinction between the sacred and the secular, or overstep that distinction to exercise a kind of authority that did not inherently belong to it?

The overall contention of the argument is that the Church has too readily adopted a human style of legal sovereignty where it ought to have pursued a divinely inspired style. The survey of possible locations of human sovereignty has been set out above to show the different patterns the Church has variously borrowed and adopted from secular thought in its search for a form of institutional authority that can co-exist alongside the rule of the civil magistrate.

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<sup>129</sup> See previous footnote and the quotation to which it refers.

## **CHAPTER TWO**

# **THE CHURCH OF THE REFORMATION: THE BATTLE FOR COVENANTED SOVEREIGNTY**

The historical exploration that begins in this Chapter demonstrates the belief that the Scottish Reformation was a constitutional and political sequence of events as much as it was a theological turning-point, and that the Church of Scotland and the civil order ever since have struggled to resolve questions of authority and sovereignty between them. In the sixteenth and seventeenth centuries especially, before Presbyterian Church government was affirmed at the Union of 1707, it was difficult to consider separately the legal structure of the Church and civil government because of their entanglement. Inevitably therefore, many of the contributions to political science and constitutional thought came from intellectuals who were protagonists in the religious conflicts of that age.

This chapter proceeds in chronological order but it is largely episodic and thematic, focusing on the events and writings that affected the Church's understanding of sovereignty, jurisdiction and covenant during its immediate post-Reformation history. In that period, the same period in which many of the secular theories of sovereignty described in Chapter One were being developed, the Church too was developing and constantly working out how best it should relate to those human institutions of political authority. The sustained narrative that follows in these next two chapters notes the times and ways in which the Church contested with the civil magistrate, and also the times and ways in which the Church of Scotland adopted and adapted the concepts of political science for its own purposes. The analysis of the 1921 Church-state settlement that is the focus of the second half of this thesis will require the understanding of the Church's previous record in relations of the state provided in this examination of the earlier modern history of the Church.

### **1. THE PROTESTANT REFORMATION**

The point of entry of the narrative that follows is the era of the Scottish Reformation of the sixteenth century. In order to describe the major changes in the



Church's polity effected by those events, five elements need to be described: (1) the sort of social interaction ('banding') in which it was traditional in Scotland to acquire or convey power and press for change; (2) the ideas inherited by Knox and others from earlier, Continental Reformers about God's gift of authority and those to whom he conveyed it; (3) the possible effects of the Reformation upon civil rule; (4) the thinking of Knox on issues of Church and secular power; and (5) the things the Reformation in Scotland succeeded in changing.

### **Banding**

'... while bonding or banding for various causes, or the achievement of a desired end, was not new, the religious connotation was an innovation and one which was to be extended as time went on.'<sup>1</sup>

The 'band' was a traditional agreement that defined relationships between individuals, often those of equal status or, in the feudal system, between persons of different social rank.<sup>2</sup> The original Reformation use of the band appeared in the Godly Band of 1557, involving 'the Lords of the Congregation' (Argyll, Glencairn, Morton, Erskine of Dun and others)<sup>3</sup> who undertook together to work for a religious purpose that they knew was against the prevailing customs of Scotland. The Lords were motivated in part by theological conviction, but in part also by the sense of political threat from France,<sup>4</sup> and so their agreement had both civil and religious aims.<sup>5</sup>

The ensuing events of the Scottish Reformation comprised a series of alliances that changed structures and people, sometimes against their will. This account will narrate how these alliances shifted the distribution of authority back and forth, within and beyond the Church. Banding was the way to achieve dynamic

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<sup>1</sup> I.B. Cowan, 'Church and Society in Post-Reformation Scotland', *Records of the Scottish Church History Society* volume xvii (1971) 185-201 p. 198

<sup>2</sup> D. Stevenson, *The Covenanters: The National Covenant and Scotland* (Edinburgh: Saltire Society, 1988), p. 28

<sup>3</sup> J. Lumsden, *The Covenants of Scotland* (Paisley: Alexander Gardner, 1914), p. 21-27

<sup>4</sup> I.B. Cowan, *The Scottish Reformation: Church and Society in sixteenth century Scotland* (London: Weidenfeld and Nicolson, 1982), p. 118

<sup>5</sup> E.J. Cowan, 'The Making of the National Covenant' in J. Morrill, ed., *The Scottish National Covenant in its British Context* (Edinburgh: University Press, 1990), p. 70

change in an era whose political institutions, e.g. the Estates,<sup>6</sup> were limited and rather stagnant and whose monarch did not share the point of view of those who were banding against her.

### The Godly Prince and the Godly Magistrate

The monarch had a key role in determining the religious shape of society in the Reformation period. The maxim *cuius regio, eius religio* emerged from the Peace of Augsburg in 1555. It was the principle whereby the sovereign prince of each realm within the Holy Roman Empire (not Emperor Ferdinand I himself) had the power to determine the polity of the official Church of the realm. This was necessary because some territories had remained Roman Catholic whereas other parts of the Empire had become Lutheran. Luther was somewhat inconsistent in determining what would be the area of the prince's sacred jurisdiction: it 'expanded and contracted in direct proportion to the godliness or lack of it of the rulers in question'.<sup>7</sup> Where the *landesherren* did not meet Luther's spiritual standards, he tended to place more emphasis on the role of the Church's own leaders to bring about the Reformation. The idea of a 'godly prince' nevertheless dominated the planning of some early Reformers, entering the language of Protestant parties attempting to establish Protestant religion in their own countries, even countries beyond the Empire and therefore the formal application of the *cuius regio* principle. Scotland was one such country outside the Empire, but learned this theological principle through the influence on the Scottish Reformers of Continental Reformation thought.

John Calvin had not discussed the term 'godly prince', and his pupil John Knox was forced by circumstance to look to the influence of the Estates of Scotland, not its monarch, to achieve Reformation there. In 1560 Scotland had in the Lords of the Congregation a powerful group of the nobility who were determined to reform the country, but a Catholic monarch who resisted.<sup>8</sup> The monarch was regarded as the sovereign of the nation for both spiritual and temporal purposes. He or she had power

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<sup>6</sup> G. Poggi, *The Development of the Modern State: A Sociological Introduction* (London: Hutchinson and Co, 1978) chapter III describes the Estates as the form of polity linking the feudal era to the era when kings sought to exercise absolute rule. The Estates were not, however, a parliamentary form recognisable in a modern liberal democracy and were not designed to facilitate the kind of political project the Lords of the Congregation were pursuing.

<sup>7</sup> Hopfl, *Christian Polity of Calvin* p. 30

<sup>8</sup> The debate is found in Knox's *History of the Reformation*, the Fourth Book.

through national legislation and power of influence through his or her symbolic representation of the life of the country. The lower nobility had local power over dependents, tenants, feudal inferiors and so on, and could influence the many communities that made up a nation as a whole. The prince was not the only 'magistrate', and the prince and nobility were not always in agreement. Some reforming initiatives involved the exercise of sovereign authority, and others constituted revolutionary struggles for spiritual power in the nation. Where the 'prince' was regarded as not 'godly' in the Reformers' meaning of the term (i.e. sympathetic to the Protestant cause), there were other, lesser, magistrates who were enthusiasts for the new movement. It was possible to identify a godly magistrate in the absence of a godly prince, but it meant that the Church was relating to a new body of influence in the nation and not to the sovereign secular power.

### **Magisterial Reformation and Radical Reformation**

Alister McGrath in his discussion of Reformation thought explains the distinction between a 'magisterial' reformation and a 'radical' one. In a magisterial Reformation the magistrate achieves the religious change, applying the *cuius regio, eius religio* principle to the territory over which he rules; a radical Reformation takes place in spite of the magistrate's resistance and so it has dramatic social implications.<sup>9</sup> The Scottish Reformation appears to have been a hybrid because in its earlier stages the Lords of the Congregation were Protestant while Mary Queen of Scots insisted on remaining Roman Catholic. Later in the century, debate continued inside the Protestant Church and centred on questions about the best form of Church government and Church-state relations; but even then, the king was often at odds with other influential spiritual and civil leaders.

'Normally, where the reformed church obtained recognition from the sovereign, authority over the church would lie with the Crown, as happened in the Lutheran countries and in England; but exceptionally such authority might lie with the estates of the realm or with lesser magistrates, and that is what happened in Scotland.'<sup>10</sup>

In respect of the Estates the Reformation was both magisterial (to the extent that influential figures in Scottish society, who for some purposes constituted the

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<sup>9</sup> A.E. McGrath, *Reformation Thought: An Introduction* (Oxford: Blackwell, 1999), p. 5-6

<sup>10</sup> G. Donaldson, *The Scottish Reformation* (Cambridge: CUP, 1960), p. 131

civil magistrate, were committed to reform and introduced it in their own local situations)<sup>11</sup> and radical (because those same figures tried to make it a national reform, in the teeth of Mary's resistance). The Reformers did not initially adopt Luther's device of regarding sovereignty as divided between the Church and the civil order for different purposes, so it mattered very much to them that the civil sovereign should be a Protestant. The monarch as sovereign was subject to the Divine Law, but the Reformers and the monarch had different interpretations of God's commands. The Protestant party, therefore, resorted to popular resistance and the rhetoric of covenant in pursuit of their theological motives, which amounted *in extremis* to obedience to their idea of the sovereign will of God in face of the queen's failure to behave as they thought she should. The overlapping of secular and sacred authority meant that there was no clear horizontal articulation of two separate jurisdictions. It was therefore not possible for the Reformers to ignore the Crown and proceed with religious Reformation as if it were an entirely private matter. What there was, however, was an involvement of the nobility and even the commons in the transformation of society, and an assertion against the monarch of the authority of those who had hitherto simply been ruled by a Catholic Crown.

### **The Reformation under John Knox**

‘[Knox] justified the wide jurisdiction over ecclesiastical matters enjoyed by the temporal ruler through the use of biblical examples...Knox came close to the full Lutheran position that the secular magistrate had jurisdiction over all aspects of temporal life including ecclesiastical ones.’<sup>12</sup>

Lutheran theories of resistance against the magistrate were adopted by Calvinists and applied in the 1550s in Scotland and elsewhere. Two developments facilitated the Scottish Reformation as a social, as well as a religious, change. One was Calvin's extension of the right of resistance by the magistrate; he believed that those elected to rule the people could be resisted when the circumstances demanded it, and not only the highest, most distant secular powers, and he thus made the right

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<sup>11</sup> The Reformation proceeded at different speeds in different counties and burghs of Scotland. For a detailed account of the method of reform pursued in St Andrews, for example, see L.J. Dunbar, *Reforming the Scottish Church: John Winram (c.1492-1582) and the example of Fife* (Aldershot: Ashgate, 2002)

<sup>12</sup> J. Dawson, 'The Two John Knoxes: England, Scotland and the 1558 Tracts', *Journal of Ecclesiastical History* 42 (1991) 555-576 p. 575

of resistance part of the exercise of popular sovereignty.<sup>13</sup> The other was the belief adopted by Knox and other radical Calvinists that the ‘powers that be’ are not necessarily ordained by God in the first place,<sup>14</sup> so do not necessarily enjoy the protection of Romans Chapter 13. These arguments allowed Reformers of every social standing to stand up against their Catholic rulers, and with a clear conscience.

These developments are visible in the Scottish experience of the Reformation. The Church and the civil order were aspects of a single society. In the days of Knox’s religious revolution it was not a foregone conclusion that the sacred and secular realms would need to be disentangled, and a clear theory of two distinct kingdoms had not emerged. Indeed, Knox believed that the Church and the civil order both stood in need of a single process of reform.<sup>15</sup> John Knox used explicitly religious language, that of ‘covenant’, to describe the spiritual state of a Protestant nation. Before the Scottish Reformation he regarded England as a ‘covenanted’ nation, because it had officially accepted the Protestant Gospel, but he regarded Catholic Scotland as being as yet ‘uncovenanted’.<sup>16</sup> It became in Knox’s opinion the duty of the godly magistrates, the covenanted nobility, to resort to civil disobedience if need be to gain salvation in the face of a hostile Crown.<sup>17</sup> He visualised a secular ruler so much at odds with the people that armed resistance could be appropriate; so the political debates of the era of the Reformation centred on the unwillingness of the Protestants to be subject to the Crown in matters of religion, a principle expressed in the Articles of Leith of 1559.<sup>18</sup> In short, the Reformers persuaded themselves that the monarch forfeited part of his or her authority when resisting the new Church order.

Knox extended this principle even to the whole people, in his *Letter to the Commons of Scotland* of 1558 and in the draft outline of his second *Blast of the*

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<sup>13</sup> Skinner, *The Foundations of Modern Political Thought*, p. 230

<sup>14</sup> Ibid, p. 227

<sup>15</sup> J. Knox, *On Rebellion* (edited by R.A. Mason, Cambridge: CUP, 1994), *Appellation* p. 87; D. Shaw, *The General Assemblies of the Church of Scotland 160-1600: Their Origins and Development* (Edinburgh: St Andrew Press, 1964), p. 21

<sup>16</sup> Dawson, ‘The Two John Knoxes’, p. 571

<sup>17</sup> Mason, *Kingship and Commonwealth*, p. 144-5. This invoked the medieval political doctrine of *necessitas*, Shaw, *General Assemblies*, p. 14

<sup>18</sup> Knox, *History*, Book II p. 202-3



*Trumpet* of the same year.<sup>19</sup> In the latter he asserted that, since the monarch should not be an idolater in a nation subjecting itself to God, he or she could be deposed by the whole people because they all shared the responsibility for establishing the new religion. According to the Reformation historian Jane Dawson, Knox distinguished both the private actions possible to the common people to support and defend a Protestant minister in their parish (a matter of individual conscience), and the public action of those noblemen bearing office to establish and defend public worship nationally (a matter of the duty of office).<sup>20</sup> So in the Articles of Leith of 1559, the Reformers promised obedience to the Crown in all matters except religion, for which they demanded freedom to follow their own personal opinions.<sup>21</sup>

By the year from which the Scottish Reformation is conventionally dated, 1560, these concepts were enshrined in the systematic doctrinal expression of the Church. In the *Scots Confession* prepared in just a few days by Knox and others, the demands of 'good works' include the obedience of rulers and superior powers provided the orders are not contrary to the commands of God and their givers are not exceeding the bounds of their office.<sup>22</sup> In the Chapter devoted to the civil magistrate,<sup>23</sup> conspiracy against civil powers is regarded as rebellion against God, but always with the qualification that the civil magistrate should be acting within its own 'sphere'.

The concept of a covenanted nation is significant because it introduces already to Reformed thought the idea of a corporate spiritual personality belonging to the whole nation. The nation might therefore constitute a party to religious agreements, express an intention, compromise a principle or enforce a theological point of view on others. A covenanted nation was a living political entity, a spiritual being to be striven over. The nation-state in its more modern connotation was not a developed reality at this time, but there was a sense that the nation was for spiritual purposes a single corporate body and capable of a shared spiritual commitment. The

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<sup>19</sup> Knox, *On Rebellion*, p.128-9; Dawson, 'The Two John Knoxes: ', regards the 1558 tracts as the core of Knox's political writings.

<sup>20</sup> Ibid, p 568-9

<sup>21</sup> *John Knox's History of the Reformation in Scotland* p.202-3

<sup>22</sup> *Scots Confession*, in *The Book of Confessions* (Louisville: Office of the General Assembly of the Presbyterian Church (USA), 1999) p. 9-25, see Chapter XIV

<sup>23</sup> ibid Chapter XXIV



danger of this kind of rhetoric is that individual freedom of conscience is subordinated to the personality of the corporate body. A device designed to serve people's interests comes to replace their individual expression.

The governance of the civil and ecclesiastical realms overlapped; and since the first leaders of the Reformation of 1560 were amongst the magnates (i.e. the wealthy and powerful), burghers and senior nobility, their first General Assemblies were, naturally, gatherings of members of the same Estates that made up parliament. The Assembly was a 'generall assemblie of this haille realme',<sup>24</sup> suggesting that a single decision-making mechanism was separately, but only slightly differently, constituted for its spiritual and for its secular tasks. The Assembly had a particular problem between the arrival of Mary from France and the attaining of majority by her son James VI in 1578. Scotland in those years did not have someone that its Protestant lords could regard as a 'godly prince', and so the first General Assemblies related to the 'godly magistrate' to be found in the Privy Council and not to the queen or her son's regents.<sup>25</sup>

When John Knox intended that the inferior but godly magistrates of Scotland would effect Reformation in spite of the Queen's opposition,<sup>26</sup> he meant them to establish the Protestant religion first by founding it locally and protecting it against the legal and financial might of the Roman Church. The Reformers did not countenance religious pluralism i.e. the Establishment of one Church but the toleration of others. The person who suggested this solution was the Queen herself, who in 1565 refused the Estates' request for her to establish *and* adopt the Protestant form of religion. She was quite willing to establish it, and to some degree did by the assigning of the Thirds of Benefices (see below), but she refused to adopt it for herself and wished to have her own faith tolerated.<sup>27</sup> Centuries later, during the nineteenth-century debate over Establishment, writers like Thomas Chalmers pointed out the compatibility of Establishment and toleration; this first, royal attempt came to nothing.

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<sup>24</sup> Shaw, *General Assemblies* p. 18; T. McCrie, *Life of Andrew Melville* (Edinburgh: Wm Blackwood and Sons, 1856, John Menzies and Co, 1902), p. 174-5

<sup>25</sup> Shaw, *General Assemblies*, p. 25

<sup>26</sup> Dawson, 'The Two John Knoxes', p. 568

<sup>27</sup> *The Booke of the Universall Kirk of Scotland*, edited Alexander Peterkin (Edinburgh: Edinburgh Printing and Publishing Company, 1839), p. 25-35

## The Early Effects of the Reformation

The new Protestant Church worked out, in the Scots Confession and Books of Discipline, its own doctrinal standards and constitution, doing so under the authority of the Estates but in freedom from royal supervision or interference.<sup>28</sup> *The First Book of Discipline*<sup>29</sup> was compiled by the Reformers in haste and probably discussed at the first General Assembly, in December 1560, but it was never formally ratified by Parliament. It tentatively began the process of teasing out ecclesiastical and non-ecclesiastical functions, assuming the civil order had responsibility for bringing its law into conformity with Divine Law and making provision for the maintenance of the ministry, poor-support and education. The jurisdictions began to be separated in the Reformers' thought: for example the 7<sup>th</sup> head of the book allotted the response to capital crime to the civil magistrate, while the 8<sup>th</sup> left the discipline of ministers to the Church. Duncan Shaw, in his study of all the sixteenth century General Assemblies,<sup>30</sup> points out that there was no appeal from the Assembly to Parliament, so the two must have had equal authority.

A clear example of the teasing out of sacred and secular interests was in regard to the financial position of the Church, and it is sketched to illustrate the scale of the problems that had to be addressed in the new polity of the Church. One of the abuses addressed by the Reformation was the diversion to secular destinations of the temporalities (financial and property benefits) of many benefices (the wealth that produced the Church's income including its stipends). Commendators were the titular heads of religious houses who received this wealth, but in practice these nominally-religious figures were often members of royalty or the nobility, so the ancient wealth of the Catholic Church had been leaking into secular hands and leaving far fewer resources for the real work of the Church.<sup>31</sup> After the Reformation, the financial arrangements for the Church gradually translated into a system whereby the maintenance of the local Church, and its building and minister, were a property

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<sup>28</sup> J. Kirk, *Patterns of Reform: Continuity and Change in the Reformation* (Edinburgh: T+T Clark, 1989), p. 337

<sup>29</sup> *The First Book of Discipline*, with introduction and commentary by J.K. Cameron (Edinburgh: St Andrew Press, 1972)

<sup>30</sup> D. Shaw, *The General Assemblies of the Church of Scotland 1560-1600*

<sup>31</sup> See J. Kirk, *The Books of Assumption of the Thirds of Benefices: Scottish Ecclesiastical Rentals at the Reformation* (Oxford: OUP, 1995)

burden on the local landowner, along with the obligation to provide the minister for the parish and the right to select him. During the exchanges between the early General Assemblies and the Queen over the maintenance of the Protestant religion, the Articles agreed by the Assembly of 1567 included the principle (first proposed at a convention in December 1561) of the assignation of one third of the wealth of all benefices. This was like a tax, to be shared between the Crown and the Reformed Church for the support of the Protestant ministry. The remaining two thirds remained with the existing benefice holders as part of the arrangement. In practice the sharing of the Thirds between the Crown and the Reformed Church did not work out, and the December 1567 Parliament directed the whole Thirds to the Church, with only the surplus after payment of stipends reverting to the Crown.<sup>32</sup> In its temporal interests, then, the Church began to be treated as an institution capable of managing its own resources.

Yet there was no complete separation of the two spheres of authority. Just as the membership of the Estates and the Assembly largely overlapped, so also in the parishes, civil magistrates often served as elders, manning both jurisdictions and ruling the same body of people.<sup>33</sup> It was not difficult, therefore, to transfer functions from one jurisdiction into the other. When in 1560 the courts of the Catholic Church were abolished, an awkward vacuum was left in relation to the matters such courts had regulated, including consistory matters (marriage, executries etc). Until Kirk Sessions were sufficiently established to take up this responsibility, civil courts had to fill the gap, which was why Scotland had for centuries after the Reformation the curiosity of Commissary Courts. These were former ecclesiastical courts suddenly taken into the civil system, but they were not integrated into its other courts until modern times and remained for centuries with their specialist jurisdiction.<sup>34</sup> On the other hand, the consistories (the Church courts) that exercised the ecclesiastical jurisdiction not only made judgements within their sphere of jurisdiction, but judged

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<sup>32</sup> J.G. MacGregor, *The Scottish Presbyterian Polity: A Study of its Origins in the Sixteenth Century*, (Edinburgh: Oliver and Boyd, 1926), p.98-99 and Kirk, *The Books of Assumption of the Thirds of Benefices*, introductory chapter.

<sup>33</sup> McCrie, *Life of Andrew Melville* p. 155

<sup>34</sup> D.B. Smith, 'The Spiritual Jurisdiction 1560-64', *Records of the Scottish Church History Society* volume xxv (1993) 1-18 p. 1 and G. Donaldson, *Scottish Church History* (Edinburgh: Scottish Academic Press, 1985), chapter 4 sections 10-11

what that sphere included.<sup>35</sup> In time, especially in the strongly Protestant areas of the south and east of Scotland, a great deal of individual behaviour was scrutinised by the Kirk Session.

‘The disciplinary efforts of the consistories represented an early example of an attempt at social engineering on a societal scale.’<sup>36</sup>

In a legal system like Scotland’s that has grown rather than been invented, anomalies and uncertainties characterise the edges of jurisdictions. In the legal reality of early Protestant Scotland the areas of overlap were not merely marginal or trivial. Parallel jurisdictions, civil and ecclesiastical, regulated the same people and situations, often without controversy or challenge. There was, however, a growing sense of the distinctiveness of each authority, and so in some instances the uncertainty or overlap was seen as unjustified encroachment by the officers of one jurisdiction on the privileges of the other. This could happen in either direction. It was not in order for the Church to interfere with non-spiritual affairs, and Calvin’s disciple Beza advised the Scottish Reformers that the king would be entitled to send someone to interpose his authority if he suspected that the Assembly or a synod was overstepping its authority in that way.<sup>37</sup> On the other hand the Church was wary lest the king should attempt to usurp the sovereignty of Christ over His Church: for instance as early as the December Assembly of 1561 it was not clear (and for many decades to come it would remain in doubt) whether the General Assembly could meet without the permission of the Crown.<sup>38</sup> One source of jurisdiction was clearly dealt with, however: in 1567 Parliament re-enacted an *Act anent Abolishing of the Pape, and his usurped Authoritie*<sup>39</sup> removing any papal authority from recognition in Scotland.

Two observations may be made at this point about the relation between the authority of the new Protestant Church and the human sovereignty of the Scottish

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<sup>35</sup> A. Herron, *Kirk by Divine Right: Church and State: Peaceful Coexistence* (The Baird Lectures 1985) (Edinburgh: St Andrew Press, 1985), ch I

<sup>36</sup> M.F. Graham, *The Uses of Reform: 'Godly Discipline' and Popular Behaviour in Scotland and Beyond, 1560-1610* (Studies in Medieval and Reformation Thought vol LVIII) (Leiden: E.J. Brill, 1996), p. 2

<sup>37</sup> Donaldson, *Scottish Church History* chapter 11

<sup>38</sup> S. Mechie, *The Office of Lord High Commissioner* (Edinburgh: St Andrew Press, 1957), p.3

<sup>39</sup> Act 1567 c.2

Crown. First, the first leaders of the Reformation were influential men banding together to pursue an objective that they understood might have to be achieved by violent means; and the Church looked to them to achieve Reformation throughout Scotland. The Scottish Reformation was not a re-arrangement of existing human sovereignty; it was not an example of the application of the principle *cuius regio, eius religio*. Second, the Church in its very early years after 1560 began to press its claim to be a body distinct from the Crown for various purposes of governance, and established the recurring question of the period, how independent of each other the Church and the secular order should be.

## 2. THE CONSOLIDATION OF REFORMATION THOUGHT

### **George Buchanan's *De iure Regni apud Scotos***

George Buchanan, Moderator of the General Assembly of 1567, had been a member of the Reformed Church from 1561, even whilst working for the Queen in St Andrews: he remained on friendly terms with her until the birth of James and the murder of Darnley, and later became tutor to Prince James.<sup>40</sup> In the first few years after the Reformation he helped to revise the *First Book of Discipline* and worked with Knox on questions relating to the jurisdiction of the Church. His unique contribution to Scottish thought, however, was not primarily a theological one but lay in the realm of constitutional theory. Brought up in the humanist tradition,<sup>41</sup> he was an admirer of the Roman civil polity and his writing is more inspired by that kind of influence than it is directly by Scripture. He continued the strand of thought of his natural precursors John Ireland (the confessor of James III, who worked also for James IV) and John Major or Mair (Buchanan's teacher and also tutor to James V); both of whom understood political authority as dependent on the consent of the subjects.<sup>42</sup>

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<sup>40</sup> P.H. Brown, *George Buchanan, Humanist and Reformer: A Biography* (Edinburgh: David Douglas, 1890), p. 183-195

<sup>41</sup> Mason, *Kingship and Commonwealth* p. 182

<sup>42</sup> Burns, *The True Law of Kingship*, see chapter 1



*De Iure Regni Apud Scotos* is Buchanan's most celebrated work, written in 1567 (the year in which papal authority was finally removed from the Church of Scotland by Act of Parliament) though not published until 1579 (the year in which another parliamentary Act recognised the ecclesiastical jurisdiction as belonging only to the Church itself). Buchanan believed that a king receives his rights and power from the people, who prescribe the boundaries of those privileges.<sup>43</sup> The most substantial parameter of the king's power is the fact that, for Buchanan, the people is the routine legislator, through their representatives:<sup>44</sup> this thinking points forward to the idea of representative democracy and the sovereignty of an institution other than the monarchy. In *De Iure Regni* society as a whole is described as deriving from God, not from utility;<sup>45</sup> so to this extent it is not legitimate to describe Buchanan as an early social contract theorist, but fairer to identify an element of divinely-covenanted social order.

Buchanan's theory is not compatible with the claims to the Divine Right of Kings that were being articulated by Bodin and others.<sup>46</sup> Instead, Buchanan posits an arrangement between people and monarch by which the latter acquires a right of heredity; but that means that any succeeding king might not be the best possible candidate for the job, which is why his powers must be rather constrained.<sup>47</sup> Those powers traditionally exist to promote the common weal of the whole nation (*'Populi salus suprema lex esta'*<sup>48</sup>): the basic elements were the defence of the realm and the administration of justice.<sup>49</sup>

*De Iure Regni* is not directly concerned with the spiritual jurisdiction, and does not give explicit answers to questions about the relationship between civil power and spiritual authority. The historian J.H. Burns points out that *De Iure Regni* fails to make clear what precisely the remaining powers of the king are beyond those

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<sup>43</sup> Buchanan, *De Iure Regni Apud Scotos* p. 32

<sup>44</sup> Ibid, p. 33

<sup>45</sup> Ibid, p. 11

<sup>46</sup> I.D. McFarlane, *Buchanan* (London: Duckworth, 1981), p.399

<sup>47</sup> Buchanan, *De Iure Regni Apud Scotos* p. 63

<sup>48</sup> Ibid, p. 34

<sup>49</sup> R. Mason 'Covenant and Commonweal: The Language of Politics in Reformation Scotland' in N. MacDougall, ed, *Church, Politics and Society: Scotland 1408-1929* (Edinburgh: John Donald, 1983), see section III of chapter 16



described in detail by Buchanan,<sup>50</sup> and concludes that they probably involved being a moral exemplar. That is clearly a much weaker spiritual role than one of ecclesiastical government, but Buchanan was writing in 1567 and so he would not easily have attributed such power to a monarch. His theories did not include royal sovereign power extending over the life of the Church, because for him the sovereign power consisted only of what the people were able to confer upon the monarch i.e. civil power. One key effect of the Scottish Reformation was that after Mary the monarch could not presume the Church would recognise his attempts to regulate it, but he would have to contend for that, spiritual, part of his authority.

Had it not been for theories like Buchanan's, the kings and queens of Scotland might have enjoyed wider acceptance of the idea of total sovereignty over their subjects for both secular and spiritual purposes, once the authority of the Pope was removed. If the theory of Divine Right of Kings had flourished unchallenged as it did in England, an undifferentiated jurisdiction could have continued; and a very simple model of ruler sovereignty, constrained only by Divine and possibly Natural Law, would be easy to identify.

### **The Second Book of Discipline**

In 1572 Knox died and in the same year Morton became regent of Scotland. This decade marked the end of the struggle, throughout society, between Catholic and Protestant, and marked the beginning of the political struggle within the Reformed Church between the Crown's integrating view of Church-state relations and the developing Two-Kingdom view that eventually matured as Presbyterianism. Banding and contracting began to take place inside the original Reformation party, between elements whose personal and political interests differed.

For some time after the Reformation the Crown tried to continue the existence of bishops and to use them as the mechanism for royal influence over Church affairs. In 1571, following a Crown appointment to the vacant bishopric of St Andrews,<sup>51</sup> many in the Church concluded that they were unable to tolerate this kind of subjection to the secular regime. The Concordat of Leith of 1571/2 was a

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<sup>50</sup> J.H. Burns, 'The Political Ideas of George Buchanan', *Scottish Historical Review* 30 (1951) 60-8, p.65

<sup>51</sup> G. Donaldson, *Scottish Historical Documents* (Glasgow: Neil Wilson, 1997), p.137

compromise that allowed the creation of bishops who exercised the powers of the Reformed Church's superintendents and who were entirely subject to the Church for spiritual purposes (*in spiritualibus*) and subject to the Crown only for secular and property purposes (*in temporalibus*).<sup>52</sup> By the time the *Second Book of Discipline*<sup>53</sup> was drafted in 1576, received by the 1578 General Assembly and formally adopted at the Assembly of 1581,<sup>54</sup> this belief in the distinctness of the two realms became common, a belief in the mutual exclusion of two powers albeit serving the same ultimate ends and acknowledging a practical responsibility towards each other.<sup>55</sup> The Book was written under the auspices of the Assembly and was probably influenced by Andrew Melville, Moderator of the 1578 General Assembly. Melville is normally credited with being the first doctor of the Church to use an explicit Two Kingdoms theory to advance the purposes of the Reformation.<sup>56</sup>

The Church asserted its own God-given internal jurisdiction, and the civil magistrate was told that his religious responsibility was limited to the external peace of the Church.<sup>57</sup> His spiritual task was to exercise sovereignty in the service of the Church, not over it. The perceived failure of godliness in Scottish society, especially in the Crown, had forced the development of this Two-Kingdom model of Church and state. James Kirk, the modern editor of the *Second Book of Discipline*, uses a phrase common later in the history of the Church of Scotland, 'co-ordinated but distinctive jurisdictions':<sup>58</sup> this thesis contends that for the first 300 years after the Reformation the two were imperfectly co-ordinated and only patchily distinctive.

Duncan Shaw points out that the outcome was more like 'two regiments' than two kingdoms, because both powers ruled over coterminous jurisdictions (since

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<sup>52</sup> Donaldson, *The Scottish Reformation*, p. 164 The problem of the imposition of bishops emerges again a little later in this narrative, in considering the seventeenth century.

<sup>53</sup> *The Second Book of Discipline*, with introduction and commentary by J. Kirk (Edinburgh: St Andrew Press, 1980)

<sup>54</sup> A.R. MacDonald, *The Jacobean Kirk 1567-1625: Sovereignty, Polity and Liturgy* (Aldershot: Ashgate, 1998), p.21

<sup>55</sup> See below for the content of the nation's responsibility to the Church exercised through the model of Establishment. See J.H. Burns, *The True Law of Kingship*, p. 181

<sup>56</sup> Burns, *The True Law of Kingship* p. 222-5 discusses the disagreement between James VI and Melville

<sup>57</sup> *2<sup>nd</sup> Book of Discipline*, Book I

<sup>58</sup> *Ibid*, introduction p. 12

everyone was deemed to be subject to the spiritual as much as to the secular authorities). It is safer in the longer run to use the 'kingdoms' language, because once this differentiation had been affirmed the way was open for the jurisdictions under the two authorities to differentiate as well. This happened, for example, as soon as plurality of religion developed in the latter part of the next century, leaving the whole population subject to the civil jurisdiction but not quite all of it subject to the spiritual jurisdiction of the Church of Scotland. At the end of the sixteenth century, however, there were now two legal powers seeking to influence the same population but sometimes in conflict with each other.

As Kirk observed in his introduction to the *Second Book of Discipline*, '... the assistance of the civil power in reforming the Church was never allowed to obscure the separate identities of civil and ecclesiastical councils.'<sup>59</sup> The authority of the civil magistrate was required to purge and conserve religion, though this did not imply that he had any ecclesiastical jurisdiction. This aspect of Establishment involved, for example, the parallel secular punishment of those convicted of a religious offence, for example by putting to the horn anyone who had been excommunicated.<sup>60</sup> A single offence would produce a response in each jurisdiction. The *Second Book of Discipline* therefore articulates a system in which the civil authority fulfils the Genevan requirements of providing the ordinances of religion and remains involved in the system of Church finance, but loses control over spiritual matters entirely to the Church authorities.

Genevan Establishment expected two things, according to McGrath: (1) the maintenance of political and ecclesiastical order and (2) the provision of doctrinal teaching (provision in this case not to be confused with the defining of its content).<sup>61</sup> Scholarly discussion about Church Establishment is based on a distinction between the state's control of a Church (a form of vertical sovereignty), and the state's support and protection of a Church (which might be regarded as a form of servant sovereignty). Though the former definition is popularly and loosely used, it is the latter definition that constitutes Establishment in historical and legal literature and is

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<sup>59</sup> Ibid, introduction p. 12

<sup>60</sup> See Graham, *The Uses of Reform*. By the blowing of a horn an individual was made an outlaw, normally at the same time as having been excommunicated by the Church.

<sup>61</sup> McGrath, *Reformation Thought* p. 232

therefore relevant to the present discussion. The legal scholar D.M. Walker in his *Legal History of Scotland* defines the Establishment of a Church as ‘...its recognition as the privileged and solely recognised Church...’<sup>62</sup> In practice the privilege is more significant than the recognition: the state provides, or co-ordinates, the temporal resources of one Church, which normally has a corresponding national responsibility to provide the ordinances of Christian religion. In effect, proponents of Establishment regard the state as having an obligation to maintain, defend and promote the Church. Whilst this responsibility is in theory unconnected with the question of spiritual independence, it has proved difficult to keep the two from becoming entangled, because religious Establishment has often appeared to come with a political price.

### **Andrew Melville and James VI**

The *Second Book of Discipline* described the Church’s ideal of a spiritual independence from the Crown: however, the Crown (the young James VI) did not accept the constitutional theory of his tutor George Buchanan, nor the theological contention of people like Melville. When James VI reached his majority and personal rule, he expected as sovereign to enjoy an extensive authority over many aspects of the Church’s life. As the theory of Two Kingdoms put into question his sovereignty over one realm, he adopted a view firmly opposed to that of the Church. In his pamphlet *The Trew Lawe of Free Monarchies*<sup>63</sup> his high view of the Divine Right of Kings – not quite an absolute view but not much limited – clearly took issue with Buchanan’s *De Iure Regni*, because James insisted that the king was the law-maker. He had a strong sense that his was a unitary sovereignty over all the affairs of the nation, including the ecclesiastical, and so he regarded the ideas of Melville, as articulated in the *Second Book of Discipline* as challenging his sovereign authority. For example, in his *Basilikon Doron*<sup>64</sup> James wrote that the king should give reverence to his spiritual office-bearers but should reject even the advice of spiritual leaders if in his own opinion it went beyond the Word of God; and this raised again

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<sup>62</sup> D.M. Walker, *A Legal History of Scotland* vols III and IV (Edinburgh: T&T Clark, 1995 and 1996)

<sup>63</sup> Burns, *The True Law of Kingship* Ch 7 discusses James political beliefs and writings.

<sup>64</sup> James VI, *Basilikon Doron* edited by James Craigie (2 volumes) (Scottish Text Society, 1944 & 1950), p. 49

the question of where the demarcation lay between the secular and the spiritual.<sup>65</sup> For the Church's leaders, it was one thing for the state to claim that the Church did not have a secular jurisdiction, but unacceptable for the king to try to determine what the spiritual jurisdiction included.

The Church pressed the distinction of jurisdictions. In 1579, it achieved the passing of the Act anent the Jurisdiction of the Kirk,<sup>66</sup> which recognised that there was no ecclesiastical jurisdiction except what was contained in the Church or came from it. In 1581 the voting membership of the General Assembly was restricted to ecclesiastical figures to facilitate the sovereignty of the Church in the spiritual sphere.<sup>67</sup> And in 1582 the Assembly felt morally compelled to complain to the Crown that it had assumed an authority that was not proper to it,<sup>68</sup> when the so-called 'Black Acts' of that year granted supreme ecclesiastical jurisdiction to the king,<sup>69</sup> and Andrew Melville found himself on trial.

The confrontation between James and Melville over several years crystallises the dispute. At his trial after the 1582 General Assembly,<sup>70</sup> Melville demanded to be tried by the competent (i.e. Church) authority, on the ground that he was not calling into question the jurisdiction of the king but merely distinguishing it as purely temporal. At the same time, says Melville's sympathetic early nineteenth-century biographer Thomas McCrie, James was seeking sovereign authority over all causes, including ecclesiastical ones.<sup>71</sup> This, in a nutshell, is the dispute of that time:

'Knox and his colleagues asserted the claim of Christ's prophetic and priestly offices; those who came after them contended mainly for his kingly prerogatives.'<sup>72</sup>

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<sup>65</sup> Before the Reformation, for example, contract law was partly administered by the Church because so much of it was based on oaths, which were regarded as spiritual acts.

<sup>66</sup> 1579 Ch. 69

<sup>67</sup> MacGregor, *The Scottish Presbyterian Polity* p. 119-120

<sup>68</sup> *Booke of the Universall Kirk* p. 256

<sup>69</sup> MacDonald, *The Jacobean Kirk*, p. 26

<sup>70</sup> McCrie, *Andrew Melville*, p. 84-96

<sup>71</sup> James' biographer (D.H. Willson, *King James VI and I* (London: Jonathan Cape, 1956), p. 70) points out that the only use James made of the Two Kingdoms' theory was to complain when he believed the Church was too much involved in secular affairs.

<sup>72</sup> J.D. Douglas, *Light in the North: The Story of the Scottish Covenanters* (Exeter: Paternoster Press, 1964), p. 13



The famous encounter at Falkland in 1594 saw Melville summarise the significance of the Two-Kingdom theory to the king.<sup>73</sup> James' difference of opinion with the Melvillian party about the nature of his relationship with the Church meant that they did not regard him as a godly prince, try as he might to support the Church as he thought right.<sup>74</sup> King James believed that covenants were contractual (in the sense of being negotiated), and concluded that they were possible only in respect of mutable things, not in respect of universal unchangeable principles – there were some things that could not be compromised for any purpose.<sup>75</sup> So his differences with people like Melville could not be resolved by negotiation, when irreducible principles (like the Divine Right of Kings) were at stake. James' problem lay in his attempt to be a godly prince over the Church but on his own terms. When James' dependence on and attachment to the suspected Catholic Esme Stewart, Duke of Lennox, became intolerable to the Church, it retaliated in 1581 by insisting the King should sign a document called The King's Covenant (which came to form part of the text of the National Covenant in 1638). The Church also insisted that the covenant be signed by Lennox, though there was scepticism at the time about whether he was genuine in his subscription.<sup>76</sup> This early example of covenanting under pressure illustrates the potential of this religious tool to have a corrupting effect.

The complex history of relations between the Crown and the Church between the Black Acts of 1582 and the Golden Acts of 1592<sup>77</sup> adds nothing to the stalemate in the thinking of the two sides, and therefore is passed over here. The Golden Acts of 1592 did not loosen the king's power over the Church and did not remove clerics from Parliament. If Melville's version of the Two-Kingdom theory could be said to oppose the Divine Right of Kings with something approaching a divine right of presbyters, in his lifetime he did not succeed.<sup>78</sup> The nineteenth century Free Church

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<sup>73</sup> McCrie, *Andrew Melville*, p. 174-5. This was the oft-quoted occasion when Melville described the King, in the spiritual kingdom, as no more than 'God's sillie vassall'.

<sup>74</sup> K.M. Brown, 'In Search of the Godly Magistrate in Reformation Scotland', *Journal of Ecclesiastical History* 40 (1989) 553-581, p. 581

<sup>75</sup> A.H. Williamson, *Scottish National Consciousness in the Age of James VI: The Apocalypse, the Union and the Shaping of Scotland's Public Culture* (Edinburgh: John Donald, 1979), p. 50, 66

<sup>76</sup> Lumsden, *Covenants of Scotland*, p. 111-113

<sup>77</sup> Ratification of the Liberty of the Trew Kirk; of General and Synodal Assemblies; of Presbyteries; of Discipline; all Lawes of Idolatrie are abrogate; of Presentation to Benefices (Act 1592 Ch 116)

<sup>78</sup> Donaldson, *The Scottish Reformation*, p. 219



lawyer Lord Moncrieff described the question of spiritual jurisdiction in terms of the two regimes thus:

‘In times when the Royal Supremacy was denied, and the divine origin of the spiritual jurisdiction of the Church admitted, the appeal lay to the General Assembly. When the Royal Supremacy was asserted, as it was by James in 1606, the appeal lay to the temporal Court of the Privy Council.’<sup>79</sup>

In the 1590s the Church settlement involved a measure of the civil control that is known as ‘Erastianism’,<sup>80</sup> in three ways: (1) the reservation to the Crown of the right to choose the date and place of the General Assembly – a right struggled over especially in the later years of James’ personal Scottish rule;<sup>81</sup> (2) the ratification by Parliament of the form of Church government; and (3) the failure to annul the 1584 Act that gave royal supremacy.<sup>82</sup> The Melvillian era produced the theory of two separate kingdoms, but could not overcome a monarch determined to claim an undifferentiated, divinely granted sovereignty.

The Reformed analysis of authority maintains that the ultimate sovereign in any jurisdiction is God, so to the Protestant eye both kingdoms belong to the reign of God. This means that the distinction between the theory of Two Kingdoms and the older theory of One Kingdom is at times a fine one, having as they do a single ultimate sovereign, and much of the analysis of one theory can fit the other. The twentieth-century Scottish historian Gordon Donaldson, for example, defined One Kingdom theory as follows:

‘...[it] sanctifies the state as well as the church, seeing them as both alike subject to the Kingship of Christ.’<sup>83</sup>

The same might equally be said of the Two-Kingdom theory, except that there the manner of subjection to the sovereignty of God differs between the two realms. The structures of authority are not intrinsically connected, and the

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<sup>79</sup> Lord Moncrieff, ‘Church and State from the Reformation to 1843’ in R. Rainy, Lord Moncrieff and A. Taylor Innes, *Church and State Chiefly in Relation to the Law of Scotland* (Thomas Nelson, 1878), p. 130

<sup>80</sup> After the Swiss Reformation theologian Thomas Erastus, who believed that where there was only one religion in a country, the civil authority had the responsibility of exercising a spiritual jurisdiction.

<sup>81</sup> M. Lee, Jr., ‘James VI and the Revival of Episcopacy in Scotland 1596-1600’, *Church History* 43 (1974) 50-64

<sup>82</sup> MacDonald, *The Jacobean Kirk*, p. 48

<sup>83</sup> Donaldson, *Scottish Church History*, p. 235

relationship between the two is open to debate. In medieval One Kingdom theory the same sword-bearer (ultimately the Pope) has two weapons, civil and spiritual, and lends one to the secular authority: in Reformed two kingdom theory there ought to be only one sword, and it is in the hand of a secular authority answerable only to God, but not to the Church, for its exercise of power. The decades that followed saw this pure version of the theory lost in a tremendous struggle.

Before the Union of the Crowns in 1603, the Church in Scotland had arrived at a position that recognised that Church and state had two kinds of relationship simultaneously. There was an element of independence between the two, visible in the separate Church courts that pressed a separate jurisdiction in matters the Church believed were primarily spiritual. There was an element of connection between the two, expressing the Genevan model of the state's Establishment of the Protestant religion. In other countries quite different models of Church-state relations developed that did not have this particular balance of the two elements. The tension of independence and dependence continued in the following century, and is significant for this thesis because it has always existed in some form, even to the present day.

### **3. THE SEVENTEENTH CENTURY STRUGGLE FOR SOVEREIGNTY**

#### **Federal Theology and the Doctrine of Covenant**

In the later years of the sixteenth century, a new theological theory supported the religious interpretation of covenant. Reformers like Bullinger developed a system of thought known as Federal Theology, which qualified slightly Calvin's assumption of the impenetrable sovereignty (*voluntas*) of God. Bullinger spoke of a covenant between God and humankind that was a kind of agreement, and emphasised the human responsibility to fulfil its terms. It was bilateral, but its terms were determined by God: it was a form of dynamic compact,<sup>84</sup> but without an element of

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<sup>84</sup> T.F. Torrance, *Kingdom and Church: A Study in the Theology of the Reformation* (Edinburgh: Oliver and Boyd, 1956), p. 2

negotiation.<sup>85</sup> Federal Theologians strenuously denied that a religious covenant was a contract, in the sense of a negotiation, but insisted that it was part of the exercise by God of his sovereignty over the world.

Federal Theology is controversial because of the tension it produced between covenant and predestination. God's covenant with the human race placed men and women in a living relationship with God (*confoederatio mutuis obligationis*). Meanwhile God's unconditional will (*voluntas*) placed upon those same men and women both an unconditional demand of pure faith alone (*sola fides*), and the judgement that is the most recognisable and contentious element of this theological system.<sup>86</sup> The important aspect for a study of Church-state relations is the application of this type of theology to the whole nation together. When Robert Rollock, a doctor of the Church and Principal of the University of Edinburgh, developed his Federal Theology to include the covenanted nation concept,<sup>87</sup> political and religious covenanting were identified in a way that was to set the theme for the political exchanges of the next century. The attitude behind this theme was summarised by Rosalind Mitchison:

‘Banding and covenanting gradually merged into a practice which, by associating the civil precedures of the Scottish people with God, encouraged a belief in a peculiarly close relationship between the Scots and their God.’<sup>88</sup>

It was an explosive combination; the fledgling state, an artificial corporate personality with the power to negotiate on spiritual affairs, engaging with a Church that was characterised by internal disagreement and free (in its self-understanding) of the regulation of an external human sovereign authority. The double application of the theory of covenant to both the civil and religious spheres was a uniquely Scottish phenomenon<sup>89</sup> responsible for some of the peculiarities of Scottish history.

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<sup>85</sup> See E.H. Emerson, ‘Calvin and Covenant Theology’, *Church History* 25 (1956) 136-142, p. 137-8 and S. Strehle, *Calvinism, Federalism and Scholasticism: A Study of the Reformed Doctrine of the Covenant* (Bern: Peter Lang, 1988), p. 135

<sup>86</sup> Kirk, *Patterns of Reform*, p. 72

<sup>87</sup> M. Steele, ‘The ‘Politick Christian’: the theological background to the National Covenant’ in Morrill, *Scottish National Covenant*, p. 47

<sup>88</sup> R. Mitchison, *Lordship to Patronage: Scotland 1603-1745* (London: Edward Arnold 1983) p. 28

<sup>89</sup> Cowan, E.J., ‘The Making of the National Covenant’, in J. Morrill, ed., *The Scottish National Covenant in its British Context* (Edinburgh: University Press, 1990), p. 70

In the early seventeenth century, the covenant concept featured in Christian political theory, but sometimes the pressures put on people to subscribe to a particular religious view meant they had not truly covenanted in freedom of conscience. The Scottish theologian J.B. Torrance pointed out the damage done to doctrine by the confusion of covenant with contract, which has the effect of rendering divine grace conditional. Torrance had a doctrinal concern because the contractual and therefore highly conditional expression of divine covenant tended to the impoverishment of the concept of grace; this crept into Scottish preaching during the seventeenth century, and figured in a debate surrounding the book *The Marrow of Modern Divinity* in the early eighteenth century.<sup>90</sup>

‘... it seems to me that we find a situation emerging in the 17<sup>th</sup> century, not only in Scotland, but also in France, England and New England, where the political struggles for religious and civil liberty (which were the birth pangs of modern democracy) too often led to contractual ways of thinking about God’s relation to men...’<sup>91</sup>

The Church was certain it represented God in his relations with the state. The relationship between the two authorities during the early seventeenth century could hardly be said to exemplify the notion of a covenant, because each tried to exercise the power of compulsion over the behaviour of the other. When they engaged with each other it was more like a relationship of contract than of grace, as Torrance indicates.

### **Jacobean Sovereignty over the Scottish Church**

At the beginning of the seventeenth century, the royal court was no longer present in Edinburgh, and so new kinds of distance appeared between the rule of the Church (through the General Assembly) and the secular order (through the royal Court). The Stuart monarchs, however, continued to try to blur the demarcation between the civil protection of the Church and the exercise of royal sovereignty over it. The years immediately surrounding the removal of James VI to his new English kingdom on the death of Elizabeth I were effectively a period of civil episcopacy, in which the General Assembly exercised little effective authority in resistance to the

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<sup>90</sup> J.B. Torrance, ‘Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-century Scotland’, *Scottish Journal of Theology* 23 (1970) 51-76

<sup>91</sup> J.B. Torrance, ‘The Covenant Concept in Scottish Theology and Politics and its Legacy’, *Scottish Journal of Theology* 34 (1981) 225-243 p. 231

king.<sup>92</sup> The period after 1610, when Assemblies scarcely met at all, was a time of increasing Anglicisation of Church polity and worship, culminating in the display of royal authority at the General Assembly of 1618 in Perth at which the so-called Five Articles of Perth<sup>93</sup> were approved, probably against the will of most parish ministers present.<sup>94</sup> The Articles imposed kneeling at communion, private administration of both sacraments, the observance of major feast days and episcopal confirmation. The remainder of James' reign saw rather futile attempts to implement the Articles, and the beginning of Charles I's reign saw energetic efforts to speed up the change. These were very busy and significant years, but it took until the mid-1630s before the Church succeeded in pressing its own theory of polity to dramatic effect, and so this account passes straight to that point.

When Charles introduced Canons upholding the royal supremacy in ecclesiastical affairs in 1636,<sup>95</sup> and then produced his Scottish liturgy ('Laud's Liturgy') in 1637, he did so as an expression of his belief that the Church lay under the protection of a single, sovereign prince.<sup>96</sup> When the Church responded with the sequence of events that led up to the signing of the National Covenant, they did so because they had learned to regard the civil magistrate (i.e. the King) as properly being as remote from ecclesiastical affairs as if he were not Christian.<sup>97</sup> The leaders of the covenanting movement found themselves facing Calvin's original question, whether the secular law may support the spiritual kingdom. They answered it in a new way in late 1637, when the lay members of the movement took over the governing of the realm through a committee meeting in Parliament House – initially to await the response of the King but eventually taking over the authority of

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<sup>92</sup> W.R. Foster, *The Church Before the Covenants: The Church of Scotland 1596-1638* (Edinburgh: Scottish Academic Press, 1975), p.12-19

<sup>93</sup> P. Donald, *An Uncounselled King: Charles I and the Scottish Troubles, 1637-1641* (Cambridge: CUP, 1990), p. 13

<sup>94</sup> MacDonald, *The Jacobean Kirk*, p. 163

<sup>95</sup> A.I. MacInnes, *Charles I and the Making of the Covenanting Movement 1625-1641* (Edinburgh: John Donald, 1991), p. 147

<sup>96</sup> G. Donaldson, *The Making of the Scottish Prayer Book* (Edinburgh: University Press, 1954), p. 101

<sup>97</sup> Douglas, *Light in the North* p. 46 quoting the Covenanter Gillespie

government – which was known as the ‘Tables’. It was the point at which political feelings gave way to treasonous activity.<sup>98</sup>

A perceived breach by the king of the distinction between the two kingdoms was thus met with a breach of the same divide by the Church’s party, which shows how hard it was to find the proper demarcation between the two.<sup>99</sup> It demonstrated also the temptation to the Church of wielding a civil sword, contrary to the reliance claimed by the first Reformers on the non-coercive Word.

‘In the seventeenth century the preaching of Presbyterian ministers had on occasion persuaded men to ignore their duties to their social superiors, and instead to give first priority to their obligations to God under the Covenants, but when this happened the unquestioned authority of the minister had been substituted for that of the landlord.’<sup>100</sup>

The distinction between secular and ecclesiastical regimes held, only just, even here. The movement that was to become the Covenanting party in 1638 consisted of noblemen (who were members of the Estates) and Churchmen, and the former played the political and military roles in the years of upheaval that followed. D.H. Worthington, in his thesis on the political thought of the Covenanters, observes the distinction:

‘The Kirk required the cooperation of the political, lay Covenanters to control the radical shift... Recognizing some overlap of responsibilities, the Kirk accepted a limited employment of civil instruments in their campaign.’<sup>101</sup>

The radical element in the Church tried to observe the difference between ecclesiastical and secular politics, whilst expecting the state to support the true Church as they understood it. Though the General Assembly in this period took an interest in many civil matters that were not strictly its internal business,<sup>102</sup> it did not directly govern civil society. However, the leaders of the Assembly exercised so

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<sup>98</sup> D.H. Worthington, *Anti-Erastian Aspects of Scottish Covenanter Political Thought 1637 to 1647*, Ph.d. thesis, (University of Akron 1978) p. 143

<sup>99</sup> D. Stevenson, *Revolution and Counter-Revolution in Scotland, 1644-1651* (London: Royal Historical Society, 1977), p. 106; J. Buckroyd, *Church and State in Scotland: 1660-1681* (Edinburgh: John Donald, 1980), p. 9

<sup>100</sup> Stevenson, *The Covenanters*, p. 71

<sup>101</sup> Worthington, *Anti-Erastian Aspects of Scottish Covenanter Political Thought 1637 to 1647* p. 157

<sup>102</sup> Ibid, p. 160-7



much influence over the identity of the civil authorities from year to year in this period that the support of the civil magistrate was guaranteed. The fears of the political scientist Figgis mentioned at the end of Chapter One, that Presbyterianism had the potential for theocracy and domination over the civil order, had been realised even before the National Covenant was signed.

### **The National Covenant and the General Assembly of 1638**

Archibald Johnston of Wariston, a drafter of the National Covenant and Clerk of the General Assembly of 1638, was a reader of the political theory that said that society was made up of a complex pattern of compacts, including everything from the family and economic relationships to local and national politics.<sup>103</sup> Wariston believed in the covenanted nation, ‘bound under God to uphold a Presbyterian church polity’,<sup>104</sup> and his intentions were for the whole Church and nation.<sup>105</sup> The *National Covenant*<sup>106</sup> consisted of a transcription of the King’s Covenant of 1581 followed by a long list of Acts establishing the new, Reformed religion and denying the older. Together they narrated the current legislative position of the Church, which the Covenant’s promoters claimed to be defending. The Covenant pointedly professed allegiance to the king in defence of the ‘true’ religion, constituting a challenge and test for the Crown. These elements, probably drafted by Wariston, purportedly go no further than a description of the *status quo*. The other element of the document was drafted by Alexander Henderson, Moderator of the 1638 Glasgow Assembly, and consisted of the ‘General Band’, the declaration appearing above the space for the subscription of the Covenant.<sup>107</sup> This part expressed loyalty to the king, but also set out objections to the recent innovations that the Covenanters believed were contrary to the Word of God: the support promised to the Crown was conditional on the Crown taking the right attitude to religion. This effectively compromised the royal prerogative even in civil matters by making obedience to it contingent on the

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<sup>103</sup> Cowan, ‘The Making of the National Covenant’ in Morrill, *The Scottish National Covenant*, p. 78

<sup>104</sup> D. Reid, *The Party-Coloured Mind: Prose Relating to the Conflict of Church and State in Seventeenth Century Scotland* (Edinburgh: Scottish Academic Press, 1982), p. 38

<sup>105</sup> See Donaldson, *Scottish Church History*, chapter 16 – Wariston therefore did not approve of gathered congregations since they were not compatible with his inclusive aim.

<sup>106</sup> The texts of the King’s Covenant and National Covenant may be found in Douglas, *Light in the North* Appendices I and II p. 197-205

<sup>107</sup> Lumsden, *Covenants of Scotland*, p. 225

religious behaviour of the Crown,<sup>108</sup> so it went further than any previous contention by the Church. (The assuming of civil authority by the Tables in Edinburgh had put the same principle into dramatic action.) Though the Band was attached to facilitate individual subscription, the intention was that the National Covenant was a covenant of the whole nation and not just of those who signed it. In these ways particularly, the National Covenant moved towards replacing the theory of the Divine Right of Kings with a kind of social contract theory<sup>109</sup> that was religious, because it was based on theological argument; secular, because it went beyond strictly theological issues; and contractual, because it imposed conditions to be fulfilled by the King.

The anomaly of the idea of national covenanting could not have been lost on the royalist side. A nation consists of many non-identical individuals, and the godly nation consisted of many people not all of whom shared the beliefs of Wariston, Henderson, Rutherford, etc. The covenanted nature of society must therefore have been an external aspect of its corporate personality, not a spiritual quality of every one of its members: it was possible to be personally hostile to the Covenant but remain a member of the nation that was politically committed to it in parliament and government.<sup>110</sup>

This mattered a great deal in the case of Charles I. For the king remained uncommitted and, throughout all the negotiations between him and the Covenanting leadership, Charles did not sign the Covenant,<sup>111</sup> fatal as that ultimately proved for him. Like his father, Charles believed some issues of principle could not be negotiated away for any gain, but he was willing to negotiate about issues of expediency and entered the 'Engagement' in 1647. This was an agreement with elements of the Scottish nobility (not with the Church itself) that promised royal confirmation of Presbyterian polity at the end of the armed struggle, in exchange for Scottish support in the English campaign. Neither part of the agreement succeeded, and after its failure the more hard-line leaders of the Covenanting movement turned against the Engagers, passing the Act of Classes in 1649 which excluded them from

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<sup>108</sup> Morrill, *The Scottish National Covenant in its British Context* p. 42

<sup>109</sup> H. MacPherson, 'The Political Ideas of the Covenanters', *Records of the Scottish Church History Society* vol i, 224-232, p. 229

<sup>110</sup> J. Coffey, *Politics, Religion and the British Revolution: The Mind of Samuel Rutherford* (Cambridge: CUP, 1997), p. 167

<sup>111</sup> Donald, *An Uncounselled King* p. 310

public office and prevented their subscribing the Covenant.<sup>112</sup> This represented a new corruption of the original intention of covenanting. A document that had been designed to represent the spiritual status of the whole nation was now a symbol of inclusion or exclusion, a tool of classification and discrimination. Within a generation, religious covenant had been used, first, to attribute a particular religious sentiment against the consciences of a social minority (the king's supporters) and, second, to deny to individuals the expression of personal belief. At its most corrupted, the Covenant separated Christians' private opinions from their public profession of belief.

The National Covenant was not itself a Melvillian document because it did not try to effect complete separation between two kingdoms. After all, the long list of legislation it contained was civil legislation establishing religion, and it presumed the supremacy of the King in parliament (albeit an ideal, covenanted King) over the Church.<sup>113</sup> More Melvillian was the General Assembly of 1638 in Glasgow, at which the Duke of Hamilton was the Lord High Commissioner. Failing to control the Assembly as the King intended, Hamilton left; but the commissioners continued with their business,<sup>114</sup> demonstrating their belief that the Assembly did not meet under the mandate of the Crown. They repealed all the unacceptable ecclesiastical laws of the period since 1610, denying the legitimacy of those General Assemblies that had operated under the influence of the monarch's Anglicising preferences.<sup>115</sup> It abolished the clerical estate in Parliament, on the one hand, and on the other insisted that the Assembly should determine the dates of its own meetings, a principle still observed today by Act of the Assembly. The experience of civil government at the time means that the Church cannot be regarded as separating from the state completely at this stage, but the Assembly had taken the step of separating the Church from the control of the Crown.<sup>116</sup> Peter Donald, whose study of Charles I in Scotland follows these events in detail from the point of view of the Crown, sees

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<sup>112</sup> Stevenson, *Revolution and Counter-Revolution*, p. 229

<sup>113</sup> W. Makey, *The Church of the Covenant 1637-1651: Revolution and Social Change in Scotland* (Edinburgh: John Donald, 1979), p. 29

<sup>114</sup> Donald, *An Uncounselled King*, p. 105-115

<sup>115</sup> See the Reports of the 1638 General Assembly, bound together with those of subsequent Assemblies and available in New College and in the Principal Clerk's Office.

<sup>116</sup> Makey, *The Church of the Covenant 1637-1651*, p.53

them as the placing of the Church's proper authority beside that of the King. The Church and the state operated alongside each other, and the latter existed in part to enforce the enactments of the Assembly, giving them coercive force and dealing with their civil implications.<sup>117</sup> In practice, the Commission of the Church became at this time a permanent, standing body, giving the Church an ongoing supreme authority in a time of rapid changes.<sup>118</sup>

Something of the royalists' intellectual response to this situation can be seen in the *Letter about Sovereign and Supreme Power*.<sup>119</sup> It was attributed at the time to Montrose (whose moderate attitude to the Covenant eventually saw him fighting against the more extreme covenanting leaders including the Duke of Argyll) but it was probably drafted by his colleague Napier, and it appears to concede a position akin to Buchanan's *De Iure Regni*. Sovereignty, no matter who bears it, is bounded by natural and fundamental law, and has the tasks of enforcing obedience to the law and uniting the body politic. It is in the people's hands to secure religion and justice, and the power of the sovereign is compromised either when it extends beyond its proper limit or, more disastrously, when it is too constrained to carry out its task. The letter resists the idea that the people appoint the King, or might have an interest different from his, or enjoy power divided between him and them. The understanding of those who were finally to be so loyal to the King was a long way beyond James VI's view of kingship. It was a long way short, however, of the next intellectual voice of the Church, Samuel Rutherford.

### Rutherford's *Lex, Rex*

'...the two forms of discourse in *Lex, Rex* – natural-law constitutionalism and religious covenantalism – remained in tension, and make it an ambiguous book for modern readers. On the one hand, Rutherford's arguments for popular sovereignty, the rule of law, and the right of resistance to tyranny, remind us of Locke, and can lead to the impression that the author of *Lex, Rex* was something of a modern liberal. On the other hand, his desire for a covenanted nation purged of heresy, idolatry and unbelief, makes him appear thoroughly reactionary, utterly committed to the ideals of Christendom.

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<sup>117</sup> Donald, *An Uncounselled King*, p. 257

<sup>118</sup> D. Stevenson, 'The General Assembly and the Commission of the Kirk, 1638-1651', *Records of the Scottish Church Society* 19 (1975-7) 59-79, p. 67

<sup>119</sup> D. Reid, *The Party-Coloured Mind: Prose Relating to the Conflict of Church and State in Seventeenth Century Scotland* (Edinburgh: Scottish Academic Press 1982) p. 71-78

Ultimately, it was Rutherford's 'reactionary' side that was to win out, for it was the Old Testament concept of a nation in covenant with God that lay closest to his heart. The quest for a godly nation was destined to undermine the advice of natural reason.<sup>120</sup>

Samuel Rutherford, who was a leading member of the anti-Engagement Protesters' party and represented the Scottish Church at the Westminster Assembly from 1643, subscribed to Melvillian Two Kingdoms theory.<sup>121</sup> In 1645 he wrote the populist work *Lex, Rex*, based on the idea of the sovereignty of the whole people, and again went much further than, say, Buchanan by assuming a single corporate political and spiritual personality for the population as the Covenant had done.<sup>122</sup> *Lex, Rex* is much less a work of Natural Law than Buchanan's and much more a work about theonomy, the sovereignty of God: so it does not discuss the location or content of fundamental law, but is concerned much more with the conferring of sovereign authority.

According to Rutherford, since the sovereignty of the monarch is derived from God through the people, the immediate divine covenant is with the people and not solely with the king.<sup>123</sup> Rutherford talked of the calling of a king to office through the agency of the whole people, constituting a system of *temporal* monarchy within a philosophy of popular sovereignty. All forms of jurisdiction by one man over another, he said, were artificial and, in legal-philosophical terms, 'positive'<sup>124</sup> – a contention at odds with Divine Right of Kings theory. For Rutherford, that 'positing' was the granting of fiduciary dominion, the collected sovereignty of all the people, described in Chapter One above. In exercising that dominion the king was accountable because of his covenant relationship both to God and to the people,<sup>125</sup> and the people had an ultimate responsibility to enforce the king's obligations if he did not fulfil them.<sup>126</sup> What Rutherford did allow the monarch was the kind of emergency power that Schmitt believed was the essence of sovereignty, in

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<sup>120</sup> Coffey, *Politics, Religion and the British Revolution*, p. 187

<sup>121</sup> *Ibid.*, p. 31

<sup>122</sup> Douglas, *Light in the North* p. 54

<sup>123</sup> J.F. McLearn, 'Samuel Rutherford: The Law and the King', in G.L. Hunt, ed., *Calvinism and the Political Order* (Philadelphia: Westminster Press, 1965), p. 78

<sup>124</sup> Rutherford, *Lex, Rex* Question II

<sup>125</sup> *Ibid.*, Question XIV

<sup>126</sup> *Ibid.*, Question XL



Rutherford's terms a prerogative of equity to guarantee the *salus populi* when all else failed, provided the king did not act arbitrarily to achieve this.<sup>127</sup>

As early as Question V of *Lex, Rex*, Rutherford stressed that callings to *spiritual* office are immediately of God without human settlement.<sup>128</sup> W.M. Campbell, in his doctoral thesis on Samuel Rutherford, summarises the argument thus:

‘Secular power of government he admits vests in the people who conveyed by election, but ecclesiastical power is supernatural from Christ and cannot be conveyed by them.’<sup>129</sup>

The implication of this distinction is this: civil and ecclesiastical rulers are not created by the same processes, and so they need not be necessarily the same people. This challenged the tenacious Jacobean view that secular sovereignty must imply the simultaneous ecclesiastical sovereignty of the monarch. But in common with his predecessors, Rutherford never suggested that spiritual independence was inconsistent with the Establishment principle: the king could not make spiritual laws, but he had a responsibility to help to enforce them. According to Campbell, Rutherford was in this respect a radical pupil of Knox,<sup>130</sup> in that he held to the principle of civil Establishment of Christian religion. Campbell appears to use ‘radical’ to refer to Rutherford’s strong sense of spiritual independence of the Church from state interference or sovereignty, which goes beyond the understanding of Knox’s generation.

The Covenanters’ final position may be summarised simply, thus:<sup>131</sup>

‘The Redeemer had Crown rights which were expressed in the freedom of His Church to rule itself in His Name without permission of a lesser monarchy.’

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<sup>127</sup> Ibid, Questions XXII-XXVI

<sup>128</sup> Ibid, Question V.; I.M. Smart, ‘The Political Ideas of the Scottish Covenanters: 1638-88’ in *History of Political Thought*, vol 1 (1980) 167-193 p. 169 says people were encouraged to believe they had the right to enforce their direct relationship with God.

<sup>129</sup> W.M. Campbell, *Samuel Rutherford: Propagandist and Exponent of Scottish Presbyterianism : An Exposition of His Position and Influence in the Doctrine and Politics of the Scottish Church*, Ph.d thesis (Edinburgh University, 1937) p. 139

<sup>130</sup> Campbell, *Samuel Rutherford*, p. 150

<sup>131</sup> A.I. Dunlop, *William Carstares and the Kirk by Law Established* (Chalmers Lectures 1964) (Edinburgh: St Andrew Press, 1967), p. 26



## The Later Seventeenth Century

The Westminster Standards that Rutherford helped to formulate were approved by the General Assembly of 1647. Chapter XXX of the *Westminster Confession of Faith* contains the proposition that Christ has an ecclesiastical government distinct from civil government, though it is an illustration of the variation from country to country of Church-state relations that other denominations involved in the Westminster Assembly did not all use this text.<sup>132</sup>

The problem of the age was less and less the question of whether there were two different jurisdictions, but more and more the interference in the civil jurisdiction by the Church as it implemented the extremes of its theory of covenant. The more powerful the religious leaders were, the more able they were to use covenant as the kind of compact where other people's wills were either changed or over-ridden. For example, the last symbolic use of the contractual model was at the crowning of Charles II (who did take the National Covenant before his coronation), during which the sermon explicitly described a contractual interpretation of the covenants of the Old Testament.<sup>133</sup> The weaker the Church party became the less able were they to impose any covenant on others. So for example, at the height of the persecution of the later Covenanters, when all political power had gone, the Rutherglen Declaration of 1679<sup>134</sup> was an expression of the common intent of like-minded rebels, like the original 'banding' of the Reformation; this time opposed to prelacy but devoid of the power to change the position of other people. In contrast, the Test Act of 1681 expressed the intention of the restored monarchy that office-holders in both Church and state would pledge their allegiance – whether they really felt it or not – both to the Protestant faith but also to the monarch as governor in all causes, ecclesiastical as well as civil.<sup>135</sup> The *Claim of Right* of 1689 too, was at first an expression only of desire and determination,<sup>136</sup> before the support of constitutional forces brought the Protestant, Hanoverian dynasty to the throne. The

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<sup>132</sup> A.F. Mitchell, *The Westminster Assembly: Its History and Standards* (Baird Lecture 1882) (London: James Nisbet and Co, 1883), p. 321-3

<sup>133</sup> Torrance, 'The Covenant Concept' p. 238

<sup>134</sup> Lumsden, *The Covenants of Scotland*, p. 325

<sup>135</sup> A.C. Cheyne, *Studies in Scottish Church History* (Edinburgh: T+T Clark, 1999), p. 55

<sup>136</sup> As were those of the nineteenth and twentieth centuries; and they too led, some years later in each case, to constitutional change.

covenanting period saw illustrated the corrupt use of covenants to force the unwilling, and the pure use to express deep-felt religious passion.

The Covenanters did not alter the system of sacred and secular jurisdictions, but for a while they altered the balance between them in their own party's favour. Because the civil and spiritual kingdoms of Scotland were still coterminous, it is possible to think in Duncan Shaw's classification of two regimes in a single kingdom (i.e. two vertically-identical jurisdictions); and the power of churchmen like Henderson and Wariston virtually directed the policy of the revolutionary civil authorities. At times, indeed, the Church exercised an influence over civil affairs that seemed close to the medieval expectation that the secular order wielded a God-given sword to suit the designs of the Church. After half a century of this wrestling over the control of that civil sword, including the eight years of Cromwell's rule in Scotland, the persecution of the later Covenanters and the reigns of Charles II and James VII, the question of the demarcation of the two kingdoms had no agreed answer. Which was more important: to emphasise the separation of separate jurisdictions, or to point to a necessary relationship between them?

#### 4. THE EIGHTEENTH CENTURY

The eighteenth century differs from the period before it because the major contentions were few, and existed not between Church and state but within the government of the Established Church as it viewed its relations with society. There is little from this period of relevance to the later arguments of this thesis.

The sacred and secular kingdoms were geographically divided from each other in 1707. The Union of Parliaments removed the secular government from Edinburgh to London, leaving behind the Church's governance protected by the provisions of the Act of Security of November 1706.<sup>137</sup> The British sovereign remains obliged to preserve Presbyterian Church government in Scotland and the Church enjoys exemption from civil oversight in matters of worship, discipline and Church government. There was no difficulty treating the Church differently from the

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<sup>137</sup> Donaldson, *Scottish Historical Documents* p. 275

temporal authority, and this was illustrated in the period after 1707, when a single secular Parliament existed alongside two different established Churches in England and Scotland.

There have been some unusual ways of understanding these events. Looking back to 1707 from his post-Disruption vantage-point, James Ferrier, a respected Established Church moral philosopher, believed that the Scottish parliament and the General Assembly formed together the complete parliament of Scotland, which accordingly had been abolished in 1707 only *quoad civilia* but continued *quoad sacra*.<sup>138</sup> This illustrates the survival beyond the Union of a 'One-Kingdom' theory, contending for the inseparability of sacred and secular affairs in national government. If Ferrier's understanding is right, there must have been a respect in which everyone subject to the jurisdiction of parliament was also subject to the jurisdiction of the General Assembly, which was more true in 1707 (before the toleration of other denominations) than in 1848 when he wrote. This is reminiscent of Hooker's theory of the Church in England, centuries earlier.<sup>139</sup> It is difficult to see how such a One-Kingdom theory could be compatible with the toleration of religious pluralism.

More conventional is the view that the authority of the Scottish Parliament was absorbed entirely by the Westminster Parliament after 1707, but that the Church of Scotland retained the tasks of spiritual jurisdiction as a separate body. However, there were areas in which both jurisdictions had an interest, and those were the areas with the potential for dispute within the Church, as people took different views about the function of civil support of national religion.

The most contentious of these areas was the question of Church patronage. The provision of a minister by a patron, who was not as such subject to the jurisdiction of the Church's courts, required the supervision of the civil law. The induction of that minister was the spiritual responsibility of the Presbytery. Any disagreements about the settlement of a minister might involve both jurisdictions, and there was potential for dispute between the two authorities when something went

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<sup>138</sup> J. Ferrier, *Observations on Church and State* (Edinburgh: William Blackwood, 1848), p. 23

<sup>139</sup> R. Hooker, *Ecclesiastical Polity* (Arthur Pollard, editor, Fyfield, 1990): Hooker believed the citizens of England to be members of the Church of England by virtue of their citizenship, so his theory had conclusions for Church polity that were similar to those of Erastus.

wrong and it was difficult to determine fault. In 1729 the General Assembly established 'riding committees' that effected inductions against the will of the local Presbytery, during the period of unrest over the issue of patronage, and the dispute contributed to the first Secession led by Erskine in 1733. It was an example of the sense in which the ecclesiastical jurisdiction might include compulsive power.

Finlay Macdonald,<sup>140</sup> in his study of the doctrinal connections with the Church's constitutional disputes,<sup>141</sup> describes the differences of view. The Moderate party at this time had no difficulty with the fact that the Church's exclusive jurisdiction included the power to judge matters (like patronage) that had temporal elements. The Evangelical ('Popular') party (which included some who seceded in the second Secession, of 1752) could not accept that the Church would or should possess any authority except the strictly spiritual authority of the Gospel. Indeed, the basis of the Evangelicals' argument was that their subjection to the courts of the Church was '... in the Lord...', that is in the light of personal conviction and conscience. According to the Popular Party, the authority of the General Assembly depended on its consistency with the doctrine, worship and discipline of the Church, and the Assembly could not act arbitrarily. The Presbyteries under their sway believed they had the power to judge the Acts and deliverances of the Assemblies of the time. It was a questioning of the supremacy of the Assembly that was to be raised a century later from the heart of the pro-Establishment party.

The Secessions saw the departure of those who could not accept the legal relationship of patron and Presbytery, but their leaving did not solve the problem. When it emerged again a century later it did so as a full-scale crisis of spiritual independence, and this will be described in Chapter Three.

The eighteenth century had emphasised one aspect of the debate, the extent and location of sovereign power within the Church itself. As the Church had gradually achieved recognition that it had a separate authority from that of the state, it had not achieved recognition that its authority had the characteristics of a sovereign

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<sup>140</sup> Principal Clerk since 1996 and Moderator of the General Assembly of 2002

<sup>141</sup> See F.A.J. Macdonald, *Law and Doctrine in the Church of Scotland with Particular Reference to Confessions of Faith*, Ph.D thesis (St Andrews University 1983) chapter X. The doctrinal elements in these disputes are described in J.R. McIntosh, *Church and Theology in Enlightenment Scotland: The Popular Party, 1740-1800* (Scottish Historical Review Monographs Series No. 5) (East Linton: Tuckwell, 1998), ch. 3

power. That quality was finally imputed to the Church in the twentieth century, and will be scrutinised in the second half of this piece of research.

### **Conclusion**

During the first two centuries after 1560 there were different interpretations of events by those taking part in them. Two-Kingdom and One-Kingdom interpretations variously suited different parties and the demarcation between jurisdictions produced disagreements and struggles. From time to time, the problem was not the confusion of jurisdictions (a question about kingdoms) but the misuse of power (the wielding of the sword). Luther's initial image was not intended to suggest that the Church would call in her aid the power of the sword held by others, nor that she would seize and wield it by herself, nor that the civil authorities would wield their sword to dominate the Church. Yet each of these things happened in the period just described. Sometimes, law and theology encouraged it. The Reformation saw the abandonment in theology of a 'sword' or tool of legal compulsion in spiritual affairs. The Reformed Church continued to benefit from the use of the sword; sometimes because the demarcation between jurisdictions was unclear, sometimes because the secular authority wielded it in good faith on the Church's behalf, and sometimes because the Church party overstepped their authority to achieve their political ends.

The Two-Kingdom theory was not fully developed until the end of the sixteenth century, but it was the basis of the idea of spiritual independence of Church from state, which became clearer and more strident in the seventeenth century. As the distinctiveness of the two authorities became more obvious, it was as much the relationship between them as their differences that raised questions. A Scottish mixture of the theory of popular sovereignty and the idea of the covenanted nation affirmed the sense of the state as a corporate spiritual being with religious responsibilities. In practice, these responsibilities were exercised through the Establishment of religion, though the concept of Establishment was not much discussed as a debating point until it came to be challenged in the nineteenth century.

Between 1560 and 1707, Church-state relations in Scotland caused much of the unrest of the period. Two particular causes of those problems have appeared in the account so far. First, whenever any human authority claimed sovereign power

over the Church, as the Jacobean monarchs repeatedly did, the Church had to respond aggressively in order to preserve its obedience in faith to the will of God – to which it believed it had unmediated access. Second, when the Church demanded of the nation a corporate spiritual commitment, it denied the integrity of the individual's conscience and caused profound social division. In theory, the two kingdoms had common interests in promoting the Christian good of the people of Scotland; but the immediate political interests of the personalities within each institution rather compromised the manner of their relating as they resorted to negotiating agreements and imposing positions on each other, sometimes abandoning altogether the veneer of mutual interest.

The end of the seventeenth century has provided a natural watershed in this discussion because it marked the end of the period when only one form of Christian religion would be tolerated in Scotland. Questions of spiritual independence and jurisdiction might require different answers in respect of later history because the Church did not exercise a universal national authority in the same inclusive way as it had before the Union of Parliaments. The significance of the remainder of the eighteenth century lay not in any major development of Church-state relations – and for that reason there has been little of it to narrate in this study – but in the changing nature of the Established Church. In that century it began to fragment into competing Reformed strands, and had to cope with the toleration of the Episcopal Church and the diversification in other ways of the Scottish Christian community.



## **CHAPTER THREE**

### **AN INHERENT JURISDICTION**

In the period of post-Reformation history described in Chapter Two, the Church and the secular order were closely bound together in the disputes and wars over religion. In the sixteenth century the Church was looking for a ‘Godly magistrate’, who would commit the resources and influence of worldly rule to the cause of the Reformation of religion. In the seventeenth century the Covenanters were interested in nothing less than the covenanting of the whole nation. There was to be no clear boundary between the Church and the civil order in political and legal terms, and the whole nation and its leadership became entangled in spiritual dispute. The Secessions of the eighteenth century indicated a belief amongst some that there were elements of the life of the Church that should be free from outside interference, and that marked a distinction in law between the Church and the rest of society.

This Chapter deals with the nineteenth and early twentieth century history of the Church of Scotland as a legal body. The continuing historical narrative traces the way in which the Church’s distinctive identity in law became clearer and more of a cause of controversy and division in the nineteenth century, and the process by which the experience of the separation of the authority of the Church and the civil order was formalised in the Church-state settlement of 1921. The later chapters of this thesis will then concentrate on the implications of that settlement in the present and the future.

#### **1. THE TEN YEARS’ CONFLICT**

##### **The Veto Act of 1834 and the Position of Thomas Chalmers**

In the early nineteenth century, there was in the Scottish Church a small but growing movement of what was known as Non-Intrusionism, which was an objection to the intrusion of secular authority into matters pertaining to the call of ministers to charges and, by implied extension, to the Church’s whole spiritual jurisdiction. As

far as patronage itself was concerned, the situation was complex:<sup>1</sup> it was recognised that the power of patronage was a civil property right that could not simply be expropriated by the Church from the current holders, some of whom were perfectly unobjectionable in the way they exercised it.<sup>2</sup> The social reformer and later leader of the Evangelical Party, Thomas Chalmers, recognised this tension and did not join the calls for the repeal of the 1712 Patronage Act, believing instead that it was possible to introduce the philosophy of non-Intrusion into the existing system.<sup>3</sup> The General Assembly of 1834, influenced by Chalmers and the Evangelical Party, passed a Veto Act giving the congregational electors not only the power to call the nominated minister but also a new power to veto him against the will of the nominating patron. A comparison with modern practice will explain the significance of the Act. In today's Church the congregation is responsible, through its Nominating Committee,<sup>4</sup> for the identification of a possible minister, for the election of that person by the whole congregation and for the signing of the Call document. Sometimes the distinction between the second and third of those tasks is not clear to congregations, who cannot see the point of having two separate stages. In fact, the election stage gives them an opportunity to say whether it is their preference to have this person as their minister; and until very recently some congregations were expressing a preference from a short list. The Call, on the other hand, is the opportunity to invite the person to be minister and offer support and loyalty, an opportunity that may be taken by someone who did not vote for the nominee for one reason or another, but is willing to adopt the decision of the majority of those voting. Before 1834, in contrast, recruiting a minister was in the power of the patron of the charge, and the electors in the congregation had only the responsibility of articulating the Call to the minister. The effect of the Veto Act was to insert the middle stage, giving the congregation the power to veto the choice of the nominee, and so giving them the second and third tasks in the process – a step on the journey towards the modern

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<sup>1</sup> S.J. Brown, *The National Churches of England, Ireland, and Scotland, 1801-1846* (Oxford: OUP, 2001) p. 293f.

<sup>2</sup> S.J. Brown, *Thomas Chalmers and the Godly Commonwealth in Scotland* (Oxford: OUP, 1982), p.225-7

<sup>3</sup> A.C. Cheyne, *The Ten Years' Conflict and the Disruption: An Overview* (Edinburgh: Scottish Academic Press, 1993), p. 3

<sup>4</sup> This is the nomenclature of Act VIII 2003, but would be more familiarly known as the Vacancy Committee, being the older term, e.g. in Act V 1984

practice by which all three stages are carried out by the congregation or its agents. The opponents of the Veto Act believed it was creating a strange new ecclesiastical process, when adequate safeguards already existed. For example, Christopher Johnston (who figures large in the pre-Union narrative below as the Established Church's Procurator in the years of negotiation of the Articles Declaratory) wrote in 1892 a *Handbook of Scottish Church Defence*<sup>5</sup> in which he criticised the Veto Act. He said that it illustrated confusion between the proper right of the Presbytery to judge the doctrinal and other suitability of the presentee (and if necessary to refuse to ordain and induct him), and the unprecedented right created by the Act for a congregation simply to reject him.<sup>6</sup> The latter, some felt, was an illegitimate encroachment by the General Assembly into the jurisdiction of the civil law, because it gave to the congregation an element of discretion that it had not had when its task was only the symbolic one of signing the Call.

In 1838, just before the beginning of the series of legal cases that was to force the issue five years later, Thomas Chalmers gave a celebrated series of lectures in London in which he set out his position.<sup>7</sup> It was certainly not a Melvillian, radically two-kingdom type of theory, because Chalmers clearly thought in terms of a single godly commonwealth in which the Church and state, in separate spheres of jurisdiction, complemented one another for a common end. The political theologian Duncan Forrester observes that this position is closer to the vision of the First than of the Second Book of Discipline.<sup>8</sup> Chalmers believed that the legislature had to decide a question of religious truth only in choosing which denomination was its partner, but should never have cause to consider questions of theological detail beyond that.<sup>9</sup> From the Church's point of view, Chalmers stated 'We have no other communication

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<sup>5</sup> C.N. Johnston, *Handbook of Scottish Church Defence* (Edinburgh: James G Hitt, 1892) – this is arranged dictionary style, so page references are inappropriate

<sup>6</sup> Cheyne, *The Ten Years' Conflict and the Disruption: An Overview* p. 4 talks of the danger of the non-Intrusionist policy being more congregationalist than Presbyterian. Even today, the range of matters on which a congregation has any binding power of determination is negligible, and so this must have been an extraordinary new kind of right in 1834, astonishing to the opponents of the Act.

<sup>7</sup> Brown, *The National Churches of England, Ireland, and Scotland, 1801-1846*, p.226

<sup>8</sup> D.B. Forrester, 'Ecclesia Scotiana - Established, Free or National?', *Theology* vol CII March/April 1999 no 806 p. 83

<sup>9</sup> O. Chadwick, 'Chalmers and the State', in A.C. Cheyne, *The Practical and the Pious: Essays on Thomas Chalmers (1780-1847)* (Edinburgh: St Andrew Press, 1985), p. 73

with the State than that of being maintained by it...'<sup>10</sup> This is the most vivid illustration in Scottish history of the difference between Establishment (which we have seen originated in the Genevan model of the protection and provision of religion) and civil involvement in the governance of the Church. Grasping the fact – surprising to the novice in this field – that Chalmers was not anti-Establishment is the key to avoiding confusion in the remainder of the historical story.

### The pre-Disruption cases

A series of actions in the civil courts resulted from the Veto Act, and the first of them was the *Auchterarder* case,<sup>11</sup> which ran from 1838 to 1843. The Earl of Kinnoull, a patron thwarted by the local congregation's veto, resorted to civil law. In the first of a series of judgements, the Court of Session instructed the induction of the presentee, Mr Young, on the basis that statute law had not sanctioned the passing of the Veto Act by the General Assembly. The second case was a claim for damages by the presentee; this constituted a claim that the civil courts, in instructing a spiritual act by the Church courts, created a quantifiable interest for the individual. The third case in the series ordained that the minority of the Presbytery of Auchterarder (those who were willing to obey the earlier civil judgement) could ordain and induct the presentee. This effectively defined the authority of the Church's courts according to their obedience to the civil courts, circumventing any stand-off between the courts of two jurisdictions but treating the Church as if its authority was a privilege conferred, not a power of its own. This last judgement was never fulfilled, as the Disruption occurred just after the final judgement was delivered.

The *Auchterarder* case involved both spiritual and temporal questions, because the issues of the induction of the appointee and his patrimonial interest were both raised. According to the constitutional lawyer Francis Lyall the case would have been unexceptional if it had dealt only with the patrimonial elements, since there would have been nothing unusual in its being appealed through the civil appeals process.<sup>12</sup> But Dean Hope of the Faculty of Advocates had voted in the 1834

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<sup>10</sup> H. Watt, *Thomas Chalmers and the Disruption* (Edinburgh: Thomas Nelson, 1943), p. 108

<sup>11</sup> *Earl of Kinnoull and Rev R Young v. Presbytery of Auchterarder* (1838) 16S 661, (1841) 3D 778, (1843) 5D 1010

<sup>12</sup> F. Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen: University Press, 1980), chapter III.II

General Assembly against the Veto Act, and he raised the question of its validity in the civil courts, encouraging a grave act of intrusion in the eyes of the Evangelical party.

Stewart Brown, biographer of Thomas Chalmers,<sup>13</sup> and Alex Cheyne, historian of the Disruption,<sup>14</sup> both make the comment that by appealing the *Auchterarder* case to the House of Lords the Church inadvertently conceded the very jurisdiction they were seeking to preserve for themselves. Ferrier, the philosopher mentioned in Chapter Two of this thesis, made a similar comment in respect of the Disruption, which he thought was a tactical blunder in resigning the very authority claimed by its supporters.<sup>15</sup> These commentators are, strictly speaking, right, but one or two distinctions from the discussion so far may help to explain this apparent error by the Church. Since the patrimonial interest of Mr Young was entangled in the larger question of the congregation's veto, it was reasonable for the Church to appeal the civil element of the problem through the civil courts, conscious no doubt that the effect would be that the House of Lords would have to take a view on the whole issue. But the majority of the Presbytery expected the House of Lords to support them, by respecting their independent spiritual jurisdiction and the right of congregational veto. In other words, the Church probably expected the House of Lords to decline jurisdiction on the greater issue of principle and adhere to the decision of the Presbytery. This would not have been a concession of jurisdiction by the Church, but an affirmation of the Church's spiritual authority by the civil court. What mattered to the Presbytery was that the exercise of the veto was a legitimate exercise of legal independence; it mattered less which jurisdiction declared it so. The principle of Establishment involves the state protecting and supporting the Church: there is no reason why the religious freedoms of a congregation may not be protected by that civil jurisdiction. Whilst the Presbytery did not analyse these distinctions, it is probably important to point out that their interest was in religious freedom and the headship of Christ, and they were less concerned how or from whom those freedoms were conveyed. They probably did not regard themselves as

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<sup>13</sup> Brown, *Thomas Chalmers and the Godly Commonwealth in Scotland* p. 298

<sup>14</sup> Cheyne, *The Ten Years' Conflict and the Disruption: An Overview* p. 6

<sup>15</sup> G.E. Davie, *The Democratic Intellect: Scotland and her Universities in the Nineteenth Century* (Edinburgh: University Press, 1964), p. 308



having made a mistake; for them the error was on the part of the Lords, with disastrous constitutional implications.

Amidst several related legal actions, the most interesting and significant was the *Marnoch* case<sup>16</sup> where the question at issue was substantially the same as in several other contemporary actions including *Auchterarder*. However, in *Marnoch* the majority of the Presbytery of Strathbogie distinguished itself by obeying the judgement of the civil court and disobeying that of the General Assembly.<sup>17</sup> Part of the significance of the ‘Reel of Bogie’, as this complex series of cases was known, lay in the way the Moderate majority was treated immediately after the Disruption. They were suspended from the exercise of their ministries by the Commission of Assembly in 1839 and deposed by the 1841 Assembly. The Established Church General Assembly of 1843 saw no need to reverse those depositions, and they were effectively restored by default. This was an acknowledgement of the duty of the Presbytery to obey the civil court, and a presumption of the invalidity of the previous Assembly’s sentence of deposition.<sup>18</sup>

There was a second strand of cases running concurrently with the ones related to the Veto Act. The 1834 Assembly had passed another contentious measure, the Chapels Act, giving seats in Presbytery, Synod and General Assembly to the ministers of new *quoad sacra* parishes that had been created in various parts of the country to meet the demands of population growth and movement. In the *Stewarton* case,<sup>19</sup> the local heritors resorted to civil action to prevent the subdivision of their historical *quoad omnia* parishes into new parishes. The judgement in the case declared the Chapels Act to be illegal because it was the creation of a jurisdiction the Church did not possess; but the effect of the judgement would be to prevent the ministers of those parishes, who helped to provide the strength of non-Intrusionist influence, from sitting in the higher courts of the Church. The Free Church apologist Thomas Brown, in his 1892 *Annals of the Disruption*, remarked that a parish *quoad sacra* had by definition fewer civil law interests than a parish *quoad omnia*, which

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<sup>16</sup> *Presbytery of Strathbogie and Rev J Cruickshank and others, suspenders and related cases*: (1839) 2D 258, 585, (1840) 2D 1047, 1380; (1840) 3D 282, (1842) 4D 1298, (1843) 5D 909, (1843) 15 Juris 375

<sup>17</sup> G.D. Henderson, *Heritage: A Study of the Disruption* (Edinburgh: Oliver and Boyd, 1943), p. 83

<sup>18</sup> P.C. Simpson, *The Life of Principal Rainy* (London: Hodder and Stoughton, 1909) Vol I, p. 70

<sup>19</sup> *Cuninghame v Presbytery of Irvine* (1843) 3D 427



made the interference of the civil courts even less warranted than in the Veto Act cases.<sup>20</sup> In all these cases, the civil courts asserted a power of direction in matters the non-Intrusionists believed lay on the Church's side of a temporal-spiritual divide between the two regimes.

### The Disruption

Chalmers was the convener of the Church's Non-Intrusion Committee, which was formed to negotiate with the government during the period of these cases. By 1839, he had begun to use the term 'Disruption' to refer to a reluctant severing of the traditional alliance of Church and state, reluctant because it was likely to involve the loss of many of the benefits of Establishment. Compared with the apparent reality of increasing 'Erastian' control by the state, and the strong allegiance of some people to the principle of complete Voluntarism (which would involve no state support for religion at all<sup>21</sup>), Chalmers tried to find a way to avoid both.<sup>22</sup> After the *Strathbogie* judgement of 1840 Chalmers hoped that Parliament would pass an Act that would affirm the Church's sovereign power in passing the Veto Act. In a complex political scene and following a sharp disagreement between Chalmers and Lord Aberdeen (on whose lack of hostility in Parliament the Church had been relying), Chalmers resigned his convenership and the measure fell.<sup>23</sup>

An Overture presented to the General Assembly of 1842 by 150 of its members came to be known as the *Claim of Right* of that year:<sup>24</sup> it set out the objections of the non-Intrusionists to the results of the legal cases, even before the last of the judgements had been delivered. Its legal claim was that the Court of Session had acted with powers that had never been conferred upon it by the British constitution, and its theological conclusion was that the Church's natural powers had been usurped.

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<sup>20</sup> T. Brown, ed., *Annals of the Disruption* (Edinburgh: Macniven and Wallace, 1892), p. 44

<sup>21</sup> The belief that the provision of the Church should be entirely the product of the voluntary offerings of its people with no support from the state and no Establishment.

<sup>22</sup> Henderson, *Heritage: A Study of the Disruption* p. 73

<sup>23</sup> I.A. Muirhead, 'Chalmers and the Politicians', in Cheyne, *The Practical and the Pious*, p. 98

<sup>24</sup> Properly the Claim, Declaration, and Protest by the General Assembly of the Church of Scotland of 1842, anent the Encroachments of the Court of Session

When the members of that same party walked out of the General Assembly of 1843 in St Andrew's Church, and proceeded to the Tanfield hall to begin their own Assembly, they signed and delivered to the government a document of Protest that reiterated their objections. The moment of Disruption was the sending of this Protest, not the walk-out from the Established Church's Assembly, because the point of Disruption related to the problem between Church and state, not the division between the Churches. The out-going minority instantly created a Church that was certainly not the ecclesiastical arm of the state, nor a beneficiary of Establishment, and so in those senses it was 'free': time would tell what degree of genuine spiritual freedom would be acknowledged in it by the civil law.

## 2. THE POST-DISRUPTION DIVISION

### **The Debate immediately after the Disruption**

The nineteenth century debate no longer used the language of kingdoms, swords, godly princes and covenants, but its participants were trying to identify the right model for the relationship of Church with state. That 'right' model was not necessarily the *status quo*: most people recognised that Church and state each had its own jurisdiction and that for many purposes they operated entirely separately. Where the jurisdictions overlapped (because an issue had both spiritual and secular elements) or conflicted (because there was dispute as to whether the civil order was entitled to take a view on an issue), the appeal to resolve the dispute lay from either side to the House of Lords. This is illustrated by the appeal by the Presbytery in the *Auchterarder* case. After the Disruption, however, the underlying question of whether there might be a theologically better form of spiritual jurisdiction brought out the different nuances of the argument.

There were several strands to the debate, and various typical positions taken.<sup>25</sup> The present discussion aims to untangle these, as they will be used to explain subsequent developments and to construct the later argument of the thesis.

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<sup>25</sup> This list is a conflation of those offered by Sjolinder, historian of the 1921 settlement, and Watt, historian of the Disruption, see R. Sjolinder, *Presbyterian Reunion in Scotland 1907-1921: Its Background and Development* (Edinburgh: T&T Clark, 1962), chapter I, and H. Watt, *Thomas Chalmers and the Disruption*, p. 164-7

At one extreme was the position adopted by Lord President Hope in the Court of Session, and by some who remained in the Establishment after the Disruption: they regarded the Church, in terms of its legal constitution, as the creation of the state and so the judicial activity of the Church as properly subject to the civil courts. Less extreme was the position of some Moderates in the Established Church, who did not regard the Church as the creation of the state. They thought that the Church had an implicit contract with secular power, acquired the position and privilege of being the national Church, and in return accepted the secular definition of its legal powers. The feeling that there was no action required to re-instate the Strathbogie Seven after the Disruption, because they had behaved properly in terms of civil and church law, illustrates these first two positions. Thomas Chalmers occupied a third position, favouring the purest balance of Establishment and spiritual independence: he saw the state as accepting its duty of religious provision for the nation, but trusting the delivery of that to a national Church that enjoyed self-determination and internal controls. Stewart Brown uses the language of contract in describing Chalmers' approach,<sup>26</sup> but it should not be confused with the implicit contract in the Moderates' position, in which spiritual independence was compromised in the interests of the benefits of Establishment. The fourth position is that of complete separation without Establishment or any other kind of spiritual relationship between Church and state. Included in this approach would be the admirers of Rutherford who regarded the Church as maintaining its own life despite state hostility, along with those who had observed other countries where the prevailing philosophy was '... the notion of states as secular entities and ... of churches as voluntary associations within them.'<sup>27</sup> Most modern discussions of the relationship of Church and state argue for some version of one or other of these latter positions.

In his history of the period and its thought, G.D. Henderson indicated the ecclesiological divergence represented in this difference of understanding:<sup>28</sup>

‘The Moderates believed that in a dispute as to whether a matter belonged to the sphere of the Church or to that of the State, the final decision must lie with the State, the law of the land being the fundamental condition of the existence of society. Evangelical

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<sup>26</sup> Brown, *Thomas Chalmers*, p. 300

<sup>27</sup> T.M. Parker, *Christianity and the State in the Light of History*, (London: A+C Black, 1955), p. 170

<sup>28</sup> G.D. Henderson, *The Church of Scotland: A Short History* (Edinburgh: Church of Scotland Youth Committee, undated), p. 140

opinion was more true to the spirit of Augustine; and inclined to identify the Church with the 'City of God' and the State with the 'City of the World', the State being thus an unfortunate necessity due to human depravity with the function of making the Church's life and work possible and protecting its liberties.'

On the issues of Establishment and spiritual independence the radical 'state-Church' view was shared by Ferrier (already mentioned)<sup>29</sup> and Lee (an Established Church theologian). They both started with the premise that the nation has a corporate spiritual identity and responsibility, and from this contention<sup>30</sup> Ferrier derived his belief (alluded to in the previous chapter) that Church and state are equally spiritual organs, which was a form of One-Kingdom theory. For Ferrier, the General Assembly was the junior chamber of Parliament, and held its authority as an integral part of the state, not from a (separate) state. He doubted whether the Assembly held its authority direct from God, arguing that would be a denial of the divine authority shared by the whole Christian community.<sup>31</sup>

Lee, writing in the year after the Disruption,<sup>32</sup> had taken the same train of thought to radical conclusions, questioning by what inherent right the General Assembly claimed to be a supreme legal authority of the Church. He denied the claim of the Church during the Ten Years' Conflict to judge what was the content of the ecclesiastical jurisdiction because he saw no legal basis for its power to allocate sovereignty. His conclusion was that the idea of spiritual independence was an arbitrary principle, since the state was a fully spiritual entity: no such independence for the Church was appropriate or necessary. It should be noted that this philosophy treated the nation as a corporate spiritual entity capable of development and self-definition, but did not accord any self-defining sovereignty to the institutional Church.

Ferrier and Lee are significant for the purposes of this thesis because they refused to accept that the Church, or its General Assembly, were sovereign bodies for legal purposes. The later history of the Church's constitutional development was premised on the notion of some kind of legal sovereignty in the Church, and it is

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<sup>29</sup> Ferrier, *Observations on Church and State*, passim

<sup>30</sup> And a leaning towards English concepts of sovereignty and Church polity, see Davie, *Democratic Intellect* p. 306

<sup>31</sup> Ferrier, *Observations on Church and State* p. 34

<sup>32</sup> R. Lee, *The Popery of Spiritual Independence* (Edinburgh: Myles Macphail, 1844)

important to recognise that such a presumption was not self-evident or non-contentious even after the Disruption.

In similar vein William Balfour, writing in opposition to the disestablishment movement in the 1870s, began with the concept of the state as a moral entity, which he derived from the belief that :

‘...the obligations of religion lie upon men in their relative and social capacity, as well as individually and personally...’<sup>33</sup>

He alluded to the tradition of the Covenanters and the idea of the covenanted nation, saying that any presumption that only individuals could subscribe a creed was disloyal to their tradition.<sup>34</sup> Voluntarism, therefore, was tantamount to ‘national atheism’.<sup>35</sup> Yet Balfour did not subscribe to a one kingdom theory: he was clear that Establishment defined the relationship between two entities, which guaranteed independence in alliance provided that the Church remained true to its credal identity.<sup>36</sup>

A non-Intrusionist like Chalmers could think in single-kingdom terms, while a defender of a covenanted nation like Balfour could begin to see the two regimes very clearly articulated: the one and two kingdom labels are therefore clearly of limited use, because people mean slightly different things by the terms they use.

The Established Church’s thinkers took a view of the maintenance of the Church that involved some elements of authority and control over it, but they were convinced that the Church had the freedoms it needed to fulfil its function. The Free Church’s writers believed their practical experience led to a different conclusion, and that the Established Church was fatally compromised in its relation with the state. By the 1870s the Free Church was moving to the Voluntarist position long held by the United Presbyterians (former Seceders): having lost the benefit and protection of Establishment and the financial support of patronage, the Free Church was forced to rely entirely on the voluntary contributions of its members. Voluntarism is the belief

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<sup>33</sup> W. Balfour, *The Establishment Principle Defended: A Reply to the Statement by the Committee of the United Presbyterian Church on Disestablishment and Disendowment* (Edinburgh: Johnstone, Hunter and Co, 1873), p. 40

<sup>34</sup> Ibid, p. 44

<sup>35</sup> Ibid, p. 2

<sup>36</sup> Ibid, p. 26 and 158



that this form of Church funding is desirable in its own right, and it became a strong principle of the United Free Church in due course. The resourcing of the Church was not the most important issue, however. The Disruption had separated the Free Church from the benefits of Establishment, not because of a philosophical objection to the Establishment principle but as the price of the greater principle of ecclesiastical freedom. The same state provided the support of Establishment and the threat to spiritual independence. Chalmers' party reluctantly concluded that to preserve the sovereignty of Christ over His Church it was necessary to break the compact with the state.<sup>37</sup> The loss of the benefits of Establishment was incidental, albeit very important. Cheyne summarised the intensity of their predicament:

‘... what kind of freedoms are so essential to a Church that to get them you must risk even the destruction of that Church? A great theme – are there moments in history when you have to kill a Church in order that it may live?’<sup>38</sup>

During the debate that followed the Disruption, Free Church writers took the view that the loss of independence was the inevitable price of state support of religion, so their eventual arrival at the Voluntarist position was the natural outcome of their constitutional position. Principal Rainy of the Free Church College taught that the privileges enjoyed by the Church in relationship with the state must always be paid for with the state's right to inspect and remonstrate with the Church's internal decisions.<sup>39</sup> His biographer quotes him as saying ‘... our controversy is with the constitution of their Church [i.e. the Established Church], not as fixed by them, but fixed for them...’<sup>40</sup> Taylor Innes, the leading ecclesiastical lawyer of the Free Church, also believed that Establishment was impossible except on a principle of legal subordination.<sup>41</sup> He and other Free Church writers of the late nineteenth century could think of Establishment only in the context of the struggle for spiritual independence, and they regarded the latter as the superior principle. By leaving the Establishment, the Free Church showed that they believed it was necessary to

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<sup>37</sup> Brown, *Thomas Chalmers*, p. 301

<sup>38</sup> Cheyne, *The Practical and the Pious: Essays on Thomas Chalmers (1780-1847)*, p. 65

<sup>39</sup> R. Rainy, ‘Church and State from Constantine to the Reformation’ in Rainy and others, *Church and State*

<sup>40</sup> Simpson, *Rainy* Vol I p. 267

<sup>41</sup> A. Taylor Innes, *The Law of Creeds in Scotland* (Edinburgh and London: Blackwood, 1867), chapter V



sacrifice privilege to secure freedom: meanwhile the belief of those who stayed behind was that the privilege enjoyed need not necessarily be inconsistent with the freedoms the Church needed. In 1872 the (Voluntarist) United Presbyterian Church issued a statement expressing concern about the civic control of the religion, damage to the divine prerogative and the violation of individual conscience. Their point was that only the Church could promote ‘a culture of religious willingness’ and that the interference by the state could not produce a genuine, individual commitment to faith.<sup>42</sup>

Reviewing these debates in 1917, Harold Laski<sup>43</sup> discussed what he believed were the only two possible ways of regarding the radical separation of the sovereignties of Church and state. One view regarded the Church as having a sphere of sovereignty uniquely separate from that of the state; and Laski believed that the passage of the Church Patronage (Scotland) Act of 1874 (the abolition of patronage) constituted the state’s concession of exactly such a separate jurisdiction to those Presbyterians who had been fighting against the notion of a unitary state. The opposite view (Laski’s own) stemmed from his belief that sovereignty is essentially indivisible and therefore inalienable; so he concluded that there was no sovereign authority apart from the state, and so no coherent political theory that made sense of this pretended ‘alienation’ of state sovereignty to the Church.<sup>44</sup>

For the purposes of the analysis of the settlement of 1921, questions arise about the legal authority of the Church. Does the Church have any authority that does not ultimately belong to the state; and if it does, is that authority a piece of what would otherwise be the state’s powers or is it something different in kind? To put it another way, if the Church is a sovereign power, is it therefore a little state within the state with its own realm, subjects and jurisprudence? Laski’s argument assumed that all legal sovereignty originally belongs to the state, and that the answer to the first question depends on whether it is possible for part of that sovereignty to be re-located elsewhere. The argument Laski had rejected – the one that became the philosophical currency of the Union negotiations before 1921 – accepted that a kind

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<sup>42</sup> Balfour, *The Establishment Principle Defended*, p. 234

<sup>43</sup> H. Laski, *Studies in the Problem of Sovereignty* (London: Humphrey Milford, 1917), chapter II

<sup>44</sup> *Ibid.*, chapter II. This conclusion is echoed in N. MacCormick, ‘The Kirk and the Theory of Sovereignty’, unpublished lecture, paragraph 13

of sovereignty might exist that did not originate from the state, nor did God convey it to the Church through the agency of the state. Both arguments, however, presume that the actors must be the national Church and the nation-state.

In Chapter One of this thesis the distinction was made between two understandings of the legal state. One regards it as being a single legal entity and the bearer of the sovereignty of the community; the other regards it as a network of the social geometry of the community, with legal sovereignty lying elsewhere (with the ruler, or the people as a whole, or the individual citizen). The thinkers of the nineteenth century were unwittingly locked into a problematic mind-set about spiritual independence because they all presumed the first of these views. They regarded the state as a monolithic authority, and so they struggled to understand how it was possible or meaningful for the Church to have a parallel authority (a ‘co-ordinate jurisdiction’) that was not just a devolved power conferred by ‘the state’. Modern sociology adopts the second way of regarding the two institutions: the Church can fit into society in many more ways than as a legal institution within a legal state. Lindsay Paterson, a sociologist of modern Scotland, describes the level of autonomy achieved by Scotland even though it has not been a self-contained independent state since 1707.<sup>45</sup> A network of distinctive and peculiar institutions has dominated Scotland since the Union (including the Church, the education system and the legal establishment), and these have supplied part of the social framework alongside the British legal state during the last 300 years. Scottish society has had its own social geometry and effective systems of governance without being a nation-state; and the Church has been a constituent part of that structure, not a body in competition with it, or subordinate to it, or in a relation of legal contract with it.

‘In having retained their church and legal system, the Scots showed a wise appreciation that there are multiple sources of social authority, and that the existence of the nation does not depend on any single one of them.’<sup>46</sup>

This provides an understanding of the relationship of Church and society that gets away from the problem of Church-state co-ordination altogether; but it was not a thought-pattern available to nineteenth century thinkers at the height of the idea of the nation-state. Theirs was an *impasse* that could not be resolved in their

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<sup>45</sup> L. Paterson, *The Autonomy of Modern Scotland* (Edinburgh: University Press, 1994), chapter 2

<sup>46</sup> *Ibid.*, p. 45

generation, because they did not have the conceptual machinery to break free from a Church-state model that consisted of a relationship between canon law on the one hand, and the classic legal machinery of the nineteenth century model of state structure on the other. Three hundred years earlier, the Reformation had been driven forwards by the Lords of the Congregation acting subversively against a resistant Crown, and the civil support for the Church did not come from the nation's sovereign power. By the Victorian era, the normal understanding of the state had developed to the point that it seemed the natural partner for the Church's national, and legal, engagement.

### **The Problems of the Free Church**

This kind of thinking had disastrous implications for the legal identity of the Free Church. The courts could not recognise the power of the Free Church to have any element of ecclesiastical jurisdiction, because they believed that this belonged exclusively to the Established Church, granted to it by the state. Christopher Johnston believed that the Free Church was a contractual organisation entirely under the jurisdiction of the civil courts like any other voluntary body.<sup>47</sup> A trust-law view of the situation regarded the Free Church as a body defined entirely by its original contractual basis (principally the Claim of Right and the papers of the 1843 Disruption Assembly, the latter of which had been recorded at the very beginning of all the Presbytery minute books throughout the Free Church). It was, in law, a denomination incapable of self-definition or development because it was entirely subject to the direction of the civil courts. The equivalent question had not arisen yet for the United Presbyterian Church (the main successor denomination to the various Churches of the Secessions). It mattered only when there was a patrimonial dispute to be settled in the civil courts, and that would not arise for the United Presbyterians until 1900 when they and the Free Church came to unite.

The turning-points of the nineteenth century's non-Intrusionist struggle had been (1) the appeal of the *Auchterarder* case to the House of Lords in the false expectation that the jurisdictional argument would be conceded, and (2) the Disruption itself when great sacrifices were made for certain important freedoms. Things might have worked out differently if the Non-Intrusionists of the nineteenth

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<sup>47</sup> Johnston, *Handbook of Scottish Church Defence* see article 'Cardross'

century had adopted the covenanting tactics of the seventeenth, insisting on their own interpretation of constitutional law and ignoring the civil courts when they appeared to be simply mistaken. To do so, they would have had to stand firm even against the judgement of the last action in the *Auchterarder* case, which permitted the Moderate minority of the Presbytery to proceed with induction – an event headed off only by the Disruption itself. Had the Church conceded the patrimonial claim of Young but refused to concede to the civil courts the determination of his call, Hope and others may have lost nerve and stopped short of insisting on the induction of the presentee by his Presbytery. Had Chalmers' party resolutely remained within the Establishment where they preferred to be, spiritual independence would have been pressed, and perhaps somehow achieved within Establishment. Had the Evangelicals faced the legal consequences of disobeying the civil courts, they might have created high profile covenanting martyrs rather than low profile, local post-Disruption misery. Had the Church before the Disruption stood out against the civil law, it might have prevailed, preserving an independent sovereignty apart from the state's, and avoiding the long diversion of fracture and re-union.

A disastrous result of these failures, many years later, was the Free Church case of 1900-1904<sup>48</sup> which followed upon the union in 1900 of most of the Free Church with all of the United Presbyterian Church. A minority of the Free Church stayed out of the Union and successfully claimed the property of the new Church, essentially arguing that only they (the minority) adhered to the original trust purposes of the Free Church begun in 1843. They persuaded the House of Lords that the Free Church could not change its fundamental principles and keep its identity, and that this was precisely what the majority was attempting to do by uniting with the United Presbyterians: the case was not about the nature of the Union, but about the original and current nature of the Free Church. The United Free Church could not accept this 'trust-deed' view, believing the Church was always living and progressing without permanently binding formularies.<sup>49</sup>

After the case was over and the minority of the Free Church had won, their own arguments left them prevented from changing and constitutionally bound to

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<sup>48</sup> *Bannatyne v Lord Overtoun* (1902) 4 F 1083: (1904) AC 515

<sup>49</sup> This description uses the analysis in K. Ross, *Church and Creed in Scotland: The Free Church Case 1900-1904 and its Origins* (Edinburgh: Rutherford House Books, 1988), chapters II and VI

conservatism from then on. The United Free Church was left to find legislative means to overcome the practical effects of their loss. The lesson for the Established Church, watching the case unfold, was that without an adequate degree of spiritual independence and power of self-determination a Church might forfeit its original corporate identity in the eyes of the civil law, so losing its property, and be obliged to start from scratch as if it were an entirely new being. That realisation would inform both the Church of Scotland and the United Free Church in the discussions of the following years.

Father Noel Figgis, whose deep fear of Presbyterian abuse of Church-state relations was quoted in Chapter One, nevertheless sympathised with the problem, and identified the absolute necessity for a Church of having the possibility of growth and change. Otherwise every Church must be regarded either as the creature of the state, or examined on the trust-deed view used in *Bannatyne v Overtoun*. Such a body would be ‘enslaved to the dead’,<sup>50</sup> unable to have any supernatural life beyond that of its individual members; and this, Figgis concluded, denied the reality of the Church’s meaningful social existence. It was left to the Churchmen of the early twentieth century to acknowledge doctrinal freedom by legislation, to allow space for the independent spiritual jurisdiction and to find a new intellectual basis for the spiritual independence from the civil magistrate. The model they opted for was one that defended spiritual freedom by asserting ecclesiastical sovereignty; that recovered a form of Two Kingdom thinking by devising virtually a Two State model. A principal contention of this thesis is that it was not a model that could work indefinitely, though it was certainly the most obvious and ingenious one available at the time.

### 3. THE TRANSFORMING OF THE CHURCH 1907-1921

#### **The Constitutional Settlement of the Church of Scotland**

Following the Free Church case in 1904, both the Established Church and the United Free Church benefited from legislation to assert their powers of theological self-determination. In 1905 there was passed in Parliament the Churches (Scotland)

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<sup>50</sup> Figgis, *Churches in the Modern State*, p. 39



Act, which was primarily designed to unscramble the mess left by the 1904 decision but also gave statutory recognition of the Established Church General Assembly's powers to change the Formula subscribed at ordinations. In 1906 the United Free Church General Assembly passed an Act anent Spiritual Independence, claiming independent jurisdiction over the four traditional areas of worship, government, doctrine and discipline.

By these steps the Churches that were eventually to unite in 1929 took steps towards self-determination and drew a new boundary between the ecclesiastical and civil orders. Within the Reformed understanding of the relationship between the Church and the civil magistrate, a distinction was clarified and an area of exclusion was marked. The claim to a power of self-determination outwith the framework of civil Establishment implied that the Church enjoyed status as a legal person, at least for spiritual purposes. Unquestioned by politicians and untested by case law, the main weakness of this assertion of legal personality was never pressed. Who or what exactly was the legal personality that had these rights of spiritual determination with no involvement from any other institution? As the Churches acted then as now mainly through smaller agencies or courts, how could it be the denomination as a whole? Was it the General Assembly of each denomination, which met for ten days each year and by occasional commissions between? These questions were and are important: it is rarely the case that the Church as a whole is the relevant party; but it is more likely to be an Assembly Board, a Presbytery or a Kirk Session. Scottish civil society, according to Professor Paterson, did not have a single source of authority and influence, but rather a network of inter-related social institutions: one might say that the Church, equally, is a complex organism whose legal competence is not located in a single authority. The contracting parties to the union negotiations set out with important questions of legal identity unasked and unanswered, but were at least armed with the resources to engage constructively with each other.

The initiative for union began in 1907, when Archibald Scott, minister of St George's Edinburgh, raised the question of inter-Church discussions at the Established Church's Presbytery of Edinburgh.<sup>51</sup> The United Free Church Assembly of the following year responded to this approach; they advanced the timetabling of their Church and State Committee's debate before the Established Church had held

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<sup>51</sup> A. Muir, *John White* (London: Hodder and Stoughton, 1958), p. 105



their equivalent debate, in order to call for the disestablishment and disendowment of the Church of Scotland.<sup>52</sup> Again, when the Church of Scotland formally asked in 1908 for discussion with the United Free Church, the latter replied the following year with a request for unrestricted conference on union.<sup>53</sup> At each stage the United Free Church had taken the initiative in challenging the Church of Scotland to go further on the problem of Establishment that stood in the way of the re-union of the two.

Each Church set up a large committee (or ‘Hundred’) to conduct the negotiations, and the leading officials of the Hundreds were to be the key historical figures in the long process of reunion. Most influential of all were the two clerks. The Church of Scotland appointed John White, who was the minister of the Barony Church in Glasgow: he was, in due course, to provide solutions to the problems relating to Article I of the Articles Declaratory (on doctrine) and to the problems of disendowment during the 1920s. The United Free Church’s secretary was an academic, Professor Alexander Martin of New College. The most important figure in relation to the legal and constitutional problems was Christopher Johnston, the Church of Scotland’s Procurator who became Lord Sands in 1917, and who has been quoted already in this chapter. The complex story of the process leading towards reunion, and the human stories of these men of leadership, may be found in Douglas Murray’s *Rebuilding the Kirk: Presbyterian Reunion in Scotland 1909-1929*.<sup>54</sup> The story of the process falls into three main phases: (1) overcoming the *impasse* on the question of Establishment (this was addressed in the years before World War I); (2) agreeing the wording and status of the statement of faith in the Church of Scotland’s Articles, which followed an internal debate between the high and low Church parties in that Church (around the end of the War); and (3) effecting the disestablishment and, especially, the disendowment of the national Church before union could proceed

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<sup>52</sup> J.R. Fleming, *A History of the Church in Scotland* (Edinburgh: T+T Clark, 1933); see ch IV for a description of the very early stages of consideration of union.

<sup>53</sup> Muir, *John White*, p. 114

<sup>54</sup> The historical treatments of this era are principally: D.M. Murray, *Freedom to Reform: The ‘Articles Declaratory’ of the Church of Scotland 1921* (The Chalmers Lectures of 1991) (Edinburgh: T+T Clark, 1993); D.M. Murray, *Rebuilding the Kirk: Presbyterian Reunion in Scotland 1909-1929* (Edinburgh: Scottish Academic Press, 2000); R. Sjolinder, *Presbyterian Reunion in Scotland 1907-1921: Its Background and Development* (Edinburgh: T+T Clark, 1962); D.M. Thomson, “‘Unrestricted Conference?’: Myth and Reality in Scottish Ecumenism” in S.J. Brown and G. Newlands, eds, *Scottish Christianity in the Modern World: essays in honour of A C Cheyne* (Edinburgh: T+T Clark, 2000)

(after the 1921 Act). The first of these three is the subject matter of the present discussion.

We have seen that Establishment does not necessarily equate with lack of independent jurisdiction, but in the pre-union negotiations the two had to be disentangled in order to guarantee the Church's spiritual freedom. Establishment involved the use of the power of the civil order to promote or defend Presbyterian government in the national Church.<sup>55</sup> The tools to achieve this were diverse, as will become apparent when the present discussion later turns to examine the remnants of Establishment in the modern Church. The nineteenth-century arguments had always centred on the source of the Established status, and whether the state conveyed it to the national Church. *Impasse* seemed inescapable between the negotiating parties, because both Churches were committed to the Reformed idea of the religious duty of the civil magistrate, but the United Free Church retained the fear of lack of spiritual independence that their constituent denominations had complained of in the nineteenth century. So any model that implied the continuing subordination of the Church to the state was unacceptable, but any transfer of those powers from the state to the Church, even irrevocably, still implied that the powers had originally belonged to the state, which failed to remove the difficulty. The Established Church side could imagine change coming only through legislative authorisation, but the United Free Church side wanted to achieve it through autonomous action; each for reasons of ecclesiological principle. What was needed was the removal, without any implication of conveyance, of the state's control of the Church of Scotland, and the retention of some spiritual function in the civil magistrate short of sovereign authority over the Church.<sup>56</sup>

At the 1911 Assembly of the Church of Scotland John White articulated the idea that the powers at issue could not have been originally conferred by parliament on the Church, since they were inherent within the Church, and all that the state could possibly give was protection of them.<sup>57</sup> They were not new rights, but they had effectively been submerged throughout the long period since the superiority of Church over state had been lost, and had been removed altogether by the decisions in

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<sup>55</sup> C.N. Johnston, 'Church Union in Scotland', *Quarterly Review* 223 (1920) 205-225, p. 222

<sup>56</sup> *Ibid*, p. 214

<sup>57</sup> Muir, *John White*, p. 123

the pre-Disruption cases.<sup>58</sup> This argument was another step in distinguishing the Church as a self-contained constitutional body, and it was therefore another stage in imputing to the Church characteristics of legal personhood. By November 1912, Professor Martin of the United Free committee recognised that progress had been made away from the old Established Church position that saw the Church as an institution of the state.<sup>59</sup>

This conceptual trick was bolstered by a linguistic device offered by Christopher Johnston.<sup>60</sup> He distinguished two meanings of the word ‘grant’, one expressing the sense of conveyance or transfer, the other expressing the sense of acknowledging a truth or proposition. He suggested that the latter meaning was intended in the Act of 1567 recognising the Scottish Reformation. That Act responded to a petition of the General Assembly craving ‘that too this our Kirk be grantit and by the present parliament conformit sic freedom, privilege, jurisdiction and authority as justly appertain to the true Kirk and immaculate spouse of Jesus Christ’.<sup>61</sup> He suggested that the function of parliament in the process that was unfolding was to grant the Church of Scotland her powers in the latter sense only. This implicitly meant that the civil power was to concede all that the non-Intrusionists had claimed in the pre-Disruption cases and all that had been argued over in the lengthy and fruitless attempts in the late nineteenth century to dismantle Church Establishment legislatively. At a stroke, the ever-mutating theories of one or two kingdoms shifted. The Church implicitly abandoned its claim to the sorts of resources that could be offered only by the secular sword, claimed only what inherently belonged to its own, spiritual nature, and finally declined those elements of its established past that relied on the substantive, ‘efficient’ elements of Establishment to empower the Church’s authority. Instead, the Church acquired a self-understanding as an entirely independent, sufficient authority in matters of doctrine, worship etc: it was thinking of itself as a separate but equal authority with the nation state, as if it were a little state in its own small dominion.

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<sup>58</sup> Ibid, p. 153

<sup>59</sup> Thomson, “‘Unrestricted Conference?’: Myth and Reality in Scottish Ecumenism’ p. 207

<sup>60</sup> Johnston, ‘Church Union in Scotland’, generally

<sup>61</sup> Macdonald, *Law and Doctrine in the Church of Scotland with Particular Reference to Confessions of Faith*, p. 307

The clever thinking of White and Johnston was used in the preparation of a Memorandum, which comprised a collection of propositions and an early draft preamble for the Bill that was to become the Church of Scotland Act 1921. The Memorandum was presented successfully to both Churches' Assemblies in 1912, and the resolution of the constitutional hurdle was within sight.<sup>62</sup> Most of the remaining years before 1921 were spent wrestling over the doctrinal issues that were eventually to be expressed in Article I, which does not concern this study.

### **The Articles Declaratory**

The 1921 settlement of the Church of Scotland's constitution made possible the negotiation of the 1929 union with the United Free Church. The settlement was expressed in the Articles Declaratory<sup>63</sup> prepared by the Established Church between 1914 and 1919 in a number of drafts and it was effected by the very brief Church of Scotland Act 1921 to which the Articles were appended. It was regarded by historians of the period as a triumph.

‘A charter of spiritual freedom had been won which seemed to meet all requirements. Parliament with hearty goodwill loosened its grip on the Church, and agreed to undo the consequences of its old Erastian policy.’<sup>64</sup>

The constitutional independence of the Church is articulated in the Fourth and Sixth Articles. In the Fourth Article the Church claims powers of legislation and adjudication in the areas of worship, government, doctrine and discipline (the areas articulated in the 1906 United Free Church Act), powers that are derived directly from Christ, and the Church declares her spiritual independence from the civil magistrate. In the Sixth Article the civil magistrate is deemed to have a separate spiritual duty under God, which does not touch the sphere of the Church's life except in the promotion of her welfare, and the Article retains for both parties the continuing right and responsibility of reviewing its implications.

The 1921 Act declared the lawfulness of the Articles, dealing with the corpus of existing legislation as follows:

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<sup>62</sup> Murray, *Rebuilding the Kirk* p. 58

<sup>63</sup> For the final text and the preceding drafts, refer to appendices to Murray, *Freedom to Reform*

<sup>64</sup> Fleming, *A History of the Church in Scotland*, p. 107

‘... no limitation of the liberty, rights, and powers in matters spiritual therein set forth shall be derived from any statute or law affecting the Church of Scotland in matters spiritual at present in force, it being hereby declared that in all questions of construction the Declaratory Articles shall prevail, and that all such statutes and laws shall be construed in conformity therewith and in subordination thereto, and all such statutes and laws in so far as they are inconsistent with the Declaratory Articles are hereby repealed and declared to be of no effect.’<sup>65</sup>

The implications and difficulties of this provision are examined below. Two indicators should be noted. First, the Act contains no exhaustive list of the repeals to which it refers. Second, the Act gave to the Church the sole right to interpret the Articles and, as Johnston (now elevated to the bench as Lord Sands) pointed out, a genuine right of interpretation must include the right to reach conclusions different from those of the civil courts.<sup>66</sup>

The cumulative effect of the Articles, the Act and all that led to their formation was a move in the direction of the theory that emphasises the separation of Church and state as much as their relation. The problem of spiritual freedom had been answered by placing the Church of Scotland in a new constitutional situation, by recovering the Melvillian version of the theory of separate kingdoms,<sup>67</sup> expressing it in the modern, state-like language of spheres and realms, and leaving the legal implications of it to unfold in due course. The chief of those implications was the recognition that the Act represented the first breach in the sovereignty of the United Kingdom parliament.<sup>68</sup> Neil McCormick, whose questioning of state sovereignty was discussed earlier, describes the settlement as a strong doctrine of divided sovereignty, and not one that allows that the Church is ultimately subject to state sovereignty. He concludes this is a perfectly legitimate view of the kind of sovereignty that exists in federal systems of rule, and implies that the British constitution became federal to this limited extent even as early as 1921.<sup>69</sup>

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<sup>65</sup> Church of Scotland Act 1921 s.1

<sup>66</sup> Murray, *Freedom to Reform*, chapter IV.4 and *Rebuilding the Kirk*, p. 92

<sup>67</sup> J.G. Kellas, *Modern Scotland: The Nation Since 1870* (London: Pall Mall, 1968), p. 63

<sup>68</sup> A. Marr, *The Battle for Scotland*, (London: Penguin, 1995), p.40; Murray, *Rebuilding the Kirk*, p. 279

<sup>69</sup> MacCormick, ‘The Kirk and the Theory of Sovereignty’, paragraphs 33-36



McCormick applauds this outcome, but this thesis questions its legitimacy in a spiritual organisation that is the Body of Christ.

Twentieth-century Scottish Church history has not been extensively studied, compared with the many treatments that exist of the seventeenth and nineteenth centuries in particular; and those studied that do exist include sociological works that trace the decline of the Church especially over the last 40 years.<sup>70</sup> It would be easy therefore to imagine that any decline in the efficacy of the 1921 settlement was due only to factors like secularisation or religious pluralism; and the stated task of this research is to approach the era from a legal, not sociological perspective. Using only the latter would miss the inherent weaknesses of the Act and Articles, which meant from the outset that the settlement would be unable to withstand legal pressures against it from future case law and constitutional change.

#### 4. THE LEGACY OF THE SETTLEMENT

The question of the Church's independence and spiritual jurisdiction had been determined by the 1906 Act anent Spiritual Independence for the United Free Church and by the Articles Declaratory for the Church of Scotland. The negotiation and achievement of the union of the two in 1929 does not concern this study, except to confirm that nothing further was added in this constitutional area in the Basis and Plan of Union. The principal lever to facilitate the union between 1921 and 1929 was the Church of Scotland (Property and Endowments) Act 1925, which arranged for the capitalisation of endowments and prepared for the vesting of ecclesiastical properties in the Church itself. Constitutionally – in theory at least – this historical survey has reached the current *status quo*, but there remain unanswered questions. One is what were those inherent weaknesses of the Act that make it such a fragile instrument. The other is what was the effect of the 1921 Act on the Established nature of the Church.

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<sup>70</sup> For example, C.G. Brown, *The Death of Christian Britain: Understanding secularisation 1800-2000* (London: Routledge, 2001) and his *Religion and Society in Scotland since 1707* (Edinburgh: University Press, 1997)



## Problems inherent in the 1921 Act

The overall conclusions of this thesis will suggest that the Church needs to change the philosophical grounds on which it understands the 1921 settlement, rather than abandon the settlement altogether. The need for such conceptual change is illustrated by the particular problems that arise when its terms are examined.

The main problem with the 1921 Act is interpretative: lack of specification of Acts in the repeals section leaves open to judicial interpretation or academic speculation the extent of the survival of pre-1921 legislation. The following Acts arguably survive in whole or in part, so far as they are consistent with the 1921 Act:<sup>71</sup> the Act anent the Abolishing of the Pape, and his usurped Authoritie 1567 c.2 (being the post-Marian re-enactment of the Act of 1560); the Act Ratifying the Presbyterian Order of the Church 1592 c.116; the Claim of Right of 1689 c.28; and the Act Ratifying the Confession of Faith, and Settling the Presbyterian Church Government 1690 c.5, which the historian A.I. Dunlop described as ‘Erastian, but necessarily so in the age it was passed’.<sup>72</sup> Explicitly constitutional provisions affecting the nature of the monarchy include the Act of Settlement 1700 c.2 and the Union Agreement of 1707 (which includes the Act for Securing the Protestant Religion and Presbyterian Church Government).

Problems have been identified with the phenomenon of lack of specification of unrepealed legislation. The constitutional lawyer Francis Lyall refers with approval to the judgement of the Lord Ordinary, Lord Pitman, in the case of *Ballantyne and Others v. Presbytery of Wigtown and Others*<sup>73</sup> (see below), that it was a pity that the drafters of the Act had not specified which old Acts, or parts of them, should be repealed. Lyall says:

‘To base such repeal simply on inconsistency with what expressly purports to be a declaratory Act may have been politically useful, but it results in legal uncertainty.’<sup>74</sup>

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<sup>71</sup> R.K. Murray, ‘The Constitutional Position of the Church of Scotland’, *Public Law* (1958), p. 155-162

<sup>72</sup> Dunlop, *William Carstares and the Kirk by Law Established*, p. 73

<sup>73</sup> *Ballantyne and Others v. Presbytery of Wigtown and Others*, 1936 SC 625

<sup>74</sup> F. Lyall, ‘Religion and Law’, *Juridical Review* (1976), p. 58-68 at p. 66

The legal uncertainties are several. The judge Lord Murray,<sup>75</sup> for example, feared that the Westminster Confession was enshrined in the 1707 Act but that there was no power in the 1921 settlement to replace it and so the Church was trapped inside one particular doctrinal position. As it happened, a more flexible view was taken of the status of the Confession during the confessional controversy of the 1970s, when the Church came close to replacing its subordinate standard of doctrine with a modern statement of faith.<sup>76</sup> However, such removal of a doctrinal standard would render the relevant parts of the 1707 Act incompatible with the Articles and thus automatically obsolete in terms of the 1921 Act. Where would that leave the 1707 provision? The problem, then, is not that the Church lacks the freedom of doctrinal development – the Articles Declaratory guarantee it – but rather that if the Church exercises those powers of development it may bring its standards into conflict with ancient statutes that have not clearly been repealed. The implication of the 1921 Act is that those ancient civil laws would have to be regarded as having been repealed, quite unintentionally, by the actions of a General Assembly. It must be unparalleled in the British constitution that an institution other than parliament has this power, by its internal actions, to alter the corpus of extant parliamentary legislation from time to time. Lord Murray believed the General Assembly would have to rely on Parliament to adjust the civil law in the event that the Church were to do anything inconsistent with the recognised civil law. This is an unexpected conclusion on his part, since the 1921 Act s.1 makes clear that the implied repeal is automatic, by authority of that Act itself. If Murray is right, what would happen if Parliament declined or failed to make the necessary adjustment? The problem of self-development, key to the 1904 Free Church case, emerges here in respect of the post-Union Church.

The obverse of this problem is the question of what would happen to these ecclesiastical provisions of the civil law in the event of the repeal of the 1921 Act, a hypothetical event but one not unimaginable in an era of fast and profound constitutional change. According to legislative convention, the repeals would not be reversed by the repeal of the repealing measure itself; but there would be

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<sup>75</sup> Lord Murray, 'Church and State', *Stair Memorial Encyclopaedia*, (London: Butterworth 1987) vol. II, p. 679-705 at p. 699

<sup>76</sup> Macdonald, *Law and Doctrine in the Church of Scotland with Particular Reference to Confessions of Faith*, Ch. XIX, describes the whole controversy

considerable doubt what provisions remained in force, and how they now related to the position of the Church. To use Lord Murray's example of the Westminster Confession: if the 1921 Act were repealed first, and thereafter the General Assembly sought to replace its current subordinate standard in the second Article with a modern statement of faith, the Assembly could utilise the provisions of Article VIII to amend Article II. But without the provisions of the 1921 Act, the 1690 and 1707 Acts would not consequently be repealed to that new extent. It is confusing enough to imagine the General Assembly inadvertently repealing civil laws by changing its standards, as envisaged in the previous paragraph above. In the absence of the 1921 provisions, however, the Church would be dependent on Parliament to remove the resulting anomaly, because the problem would be caused not by the enactment of the more modern legislation but by the non-repeal of the more ancient.

If the 1921 settlement were to be dismantled, by what authority would the privileges of the Church that were declared by that legislation be safeguarded? An example should illustrate this problem. Chapter Four of this thesis will contain a discussion of the *Ballantyne* case<sup>77</sup> already referred to, but one aspect of it may be anticipated here. The debate in that case concerned the 1874 Act abolishing patronage, and its significance after 1929. The right of a congregation to call a minister without imposition by a patron is nowhere contained in the legislative corpus of the united Church, and its authority lies historically in the 1874 Act. The authority implementing those rights had become the spiritual court with the passing of the 1921 Act but the provisions of the Act still lay in the corpus of civil law, and were never translated into the body of Church law. If the 1921 settlement were to be repealed or become obsolete, would the extant portions of the 1874 Act be once again the responsibility of the civil authority to implement? (Would the secular authority be remotely interested in fulfilling such a spiritual duty?)

One obvious circumstance in which such a profound constitutional change might be anticipated would be the alteration of the Church's structure through a process of further union with a non-Presbyterian Church. In terms of this line of argumentation, the Church need do nothing more than amend the second Article (Presbyterianism was deliberately left out of the first Article which is more

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<sup>77</sup> *Ballantyne and Others v. Presbytery of Wigtown and Others*, 1936 SC 625

problematic to change).<sup>78</sup> The present argument implies that the effect would be the automatic repeal of the Act of Settlement by the removal of its main provision, the guarantee of Presbyterian Church government. Whilst much political debate surrounds the desirability of repealing that Act on grounds of religious and anti-discriminatory sensitivity, it would appear that future denominational union may, bizarrely, have the same effect without the assistance of parliament.<sup>79</sup>

These arguments demonstrate that the Melvillian ideal of separate Church and state jurisdictions apparently achieved in 1921 falls short of the actuality. The legislative basis of the Church of Scotland's constitution is not simply the 1921 Act, but includes many civilian Acts. The extent of these is unclear and the status of them compromised by a repeal provision so peculiar and flexible that, far from separating Church and state in Scotland, it gave the power to the Church, even unwittingly, to compromise constitutional law. And yet, conversely, the whole weight of spiritual independence hangs on the fragile thread of a single Act of Parliament, the only place where the underlying theological principle is authoritatively articulated, whilst the legislative machinery of civil control remains only disabled by qualification but not eradicated by proper repeal. The problems are hypothetical, and probably largely academic provided that the 1921 settlement comes under no threat to its existence; but Chapter Four of this thesis will demonstrate that the state of the settlement is far from comfortable, and if it were dismantled these questions would be raised.

One further objection to the state of civil law repeal came from the United Free minority, led by James Barr, who complained that the ancient statutes appeared to have been repealed to the extent necessary to render them consistent with the Articles, but were not repealed to the extent necessary to remove the privileged and Established nature of the Church.<sup>80</sup>

There are then two different problems. One is the argument of the United Free minority that the civil magistrate cannot possibly resist the temptation of managing the Church's affairs. The other is the interpretative difficulty that the state

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<sup>78</sup> Murray, *Rebuilding the Kirk*, p. 73

<sup>79</sup> The abandonment of the Scottish Church Initiative for Union by the General Assembly of 2003 pushes the prospect of this problem far into the future.

<sup>80</sup> Murray, *Rebuilding the Kirk*, p. 214

is entangled legislatively in the constitutional affairs of the Church because Parliament had made a mess of loosening the grip of the civil magistrate after all.

### **The Problem of the Remnant of Establishment**

‘For many Established churchmen, untying the knot with the state weakened the presbyterian character of Scotland, and the various measures enacted by parliament were carefully formulated to maintain the appearance of a church still protected by the state.’<sup>81</sup>

The forms of covenant between Church and state described in Chapter Two were one way of ensuring that national allegiance to the Christian faith took the form of the promotion and defence of Presbyterian Church government. Establishment in the Reformed sense is simply one way of achieving that promotion, by use of the resources of the nation, legal, cultural and/or financial. As the Union approached, one of the partners still had the burden of Establishment to shed.

Within the Church of Scotland and Gladstone’s Liberal Party there had been a long-running debate about disestablishing the Church, but without success. In 1880, an attempt by pro-disestablishment activists to dominate the organisation of that Party failed. In 1882, a Bill (known from its proposer as the Peddie Bill) to effect secularisation of Church revenue and separation of Church and state did not make it as far as the House of Commons. It was recognised by people like the young John White (see above) that this measure would have deprived the Church of revenues and the benefits of endowments, and there was significant Established Church opposition to it.<sup>82</sup> In 1886, a different kind of Bill (Finlay’s Bill) was intended to facilitate the return of the Free Church to the Establishment, and was based on the 1842 Claim of Right. According to Christopher Johnston, the Established Church grudgingly tolerated it because it declared a spiritual independence they had never doubted sufficiently existed; but it was unacceptable to the Free Church because it did nothing about Establishment, so the freedoms it declared appeared to them to be conferred on the Church by the state.<sup>83</sup> Gladstone remained neutral in the debate, waiting to see what the majority opinion was on the

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<sup>81</sup> Brown, *Religion and Society* p. 145

<sup>82</sup> Muir, *John White* p. 94 and Kellas, *Modern Scotland: The Nation Since 1870*, p. 34

<sup>83</sup> Murray, *Rebuilding the Kirk*, p. 22 and see Johnston, *Handbook of Scottish Church Defence*, article on ‘Finlay’



issue, and for this Johnston criticised him for his apparent lack of decisiveness.<sup>84</sup> The matter was finally dropped by Parliament in 1895, to be dealt with in quite a different way by the Church itself.

As early as the 1890s Professor Flint, an Established Church academic delivering a public lecture, suggested the idea of removing Establishment as it was an obstacle to Church union.<sup>85</sup> He pointed out that Establishment was not itself a necessary principle, but one form of the application of the wider principle of national allegiance.<sup>86</sup> William Mair, the principal jurisprudential thinker of the Church of Scotland, wrote of Establishment at the time of the Free Church case and said it was 'a term of convenience and may well be dropped'.<sup>87</sup> Looking back on the process and defending it in an article written in 1920, Johnston again offered a linguistic trick. He suggested that the questions facing the negotiating Churches had been translated out of the language of 'Establishment' and into a vocabulary that properly reflected the recent changes to the Church's constitutional position. The new reality of the Church's freedom and territorial responsibility became unambiguous, he believed, but the language used would re-assure those who feared continued control by the state.<sup>88</sup> Opponents of Church union, including James Barr of the United Free Church minority, noticed that the process of translation could work in two directions, and after 1921 translated back into the language of Establishment what had been achieved using the more diplomatic, neutral terminology of the negotiations. On the basis of that exercise, the United Free minority complained that the post-settlement Church of Scotland was not disestablished after all. So the practice of translating the reality of Establishment out of the traditional language used of it, in order to avoid

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<sup>84</sup> Johnston, *Handbook of Scottish Church Defence*, article on 'Gladstone, The Right Hon W E'

<sup>85</sup> Note, for example, the report of the Church and State Committee of the UF Church reporting to their 1901 General Assembly in these terms:

'That we must regard the statutory connection now maintained by the State in Scotland with the Established Church as objectionable in principle, and that its termination seems to us to be a necessary step towards the relations between the Churches in Scotland, which, we believe, are very widely desired.' Quoted in J. Barr, *The Scottish Church Question* (London: James Clarke, 1920), p. 116

<sup>86</sup> Sjolinder, *Presbyterian Reunion*, p. 100

<sup>87</sup> Mair, writing in the *Blackwood Magazine*, quoted in Sjolinder, *Presbyterian Reunion*, chapter V

<sup>88</sup> Johnston, 'Church Union in Scotland' p. 220



alarming the United Free negotiators,<sup>89</sup> did not alter the fact of its existence. The point of this part of the discussion is that the process of disestablishment was just as unclear as the process of determining the independent jurisdiction and spiritual independence of the Church, because parts of the settlement could be translated quite readily back into the language of Establishment from which they had so carefully been translated ten years before.

As so often, James Barr spotted examples. For instance, of the capitalisation of endowments during the process of preparation for union, he said:

‘The public resources of the State are to be turned over permanently to the private possession of the Church. This is not disendowment; it is capitalised, complete, final, and irretrievable endowment. It is not a stroke for national justice; it is a raid on national funds.’<sup>90</sup>

This is not a discussion of the accuracy or otherwise of Barr’s underlying premise that the funds belonged to the state and should be used for properly national purposes; Barr is quoted to show that the concept of a continuing Establishment was a natural topic of discourse in the debates of the time.

Today there is an occasional debate over the question of whether Scotland still has an Established Church, and this will be discussed in the following two chapters. This, however, is the natural point in the argument to demonstrate the false premise used by some of those who argue that the Church of Scotland after the Union of 1929 remained Established. It is a mistake built on two errors: (1) the failure to separate properly the issues of Establishment and spiritual independence, a distinction that both sides of the debate after the Disruption seemed to grasp without difficulty; and (2) the failure to observe what Establishment originally meant in the Scottish context.

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<sup>89</sup> Thomson, ‘“Unrestricted Conference?”: Myth and Reality in Scottish Ecumenism’, p.215, points out that the shift away from the traditional language was an attempt to find a *modus vivendi* with people like Principal Martin of the UF Church, because he had dissented from the report of the negotiating committee to their 1910 General Assembly.

<sup>90</sup> Barr, *The Scottish Church Question* p. 37

For example, in an article addressing the Establishment question,<sup>91</sup> the constitutional lawyer Colin Munro looks in vain to the 1707 settlement for a definition of Establishment, and resorts to what he describes<sup>92</sup> as the ordinary meaning of the word. He proceeds to presume that Establishment involves the granting of a different legal status to one Church compared with others, which makes no sense when looking at the immediate post-Reformation context of monolithic Protestantism. There is no need for this: the Calvinist theology of the post-Reformation Scottish Church made quite clear what was the task of the civil magistrate in the Genevan model, as observed in the previous chapter. Beginning with that definition would produce a different line of argument from the one inevitable where the basis presumes privilege or control or state interference. Worst of all, he concludes that Establishment must still exist because, having identified the Church of Scotland immediately before 1921 as Established, he observes that the 1921 Act is clearly not a ‘disestablishing’ measure, and concludes that Establishment must therefore have survived to date. He is looking at the wrong Act. A proper conceptual distinction between Establishment and state control of the Church would recognise that the 1921 Act dealt with the latter, while most of the elements of civil support and provision of religion were removed either by the Church Patronage (Scotland) Act 1874 or by the Church of Scotland (Property and Endowments) Act 1925. There was a massive exercise of disestablishment in Scotland, but it was not the function of the 1921 Act; and those who misunderstand the Church of Scotland in this way tend to be examining the wrong evidence.

Now more than eighty years later, several elements of Establishment might be detected as continuing remnants from the older constitutional situation.<sup>93</sup> The Acts of Parliament discussed earlier in this chapter are clearly problematic and are still the subjects of much debate. The other highly visible elements that remain of

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<sup>91</sup> C.R. Munro, ‘Does Scotland have an Established Church?’, *Ecclesiastical Law Journal*, 20, 639-645. Paul Avis, a commentator on Church Establishment from within the Church of England, makes the same kind of mistake about the Church of Scotland wherever it appears in his *Church, State and Establishment* (London: SPCK, 2001)

<sup>92</sup> Munro, ‘Does Scotland have an Established Church?’ p. 639

<sup>93</sup> T.M. Taylor, ‘Church and State in Scotland’, in *The Juridical Review* (1957) 121-137. Only part of Taylor’s list of elements has been used here, as some of his suggestions, e.g. the territorial ministry, are not elements of the Establishment of the Church in the legal sense used in this discussion; they are elements of the national responsibility fulfilled by the Church referred to in Article III, but are not privileges or forms of secular support.

the old order are what Professor James Mackey called the ceremonial, rather than the substantial Establishment,<sup>94</sup> in an echo of Bagehot's distinction between the dignified and efficient parts of the state.

The Lord High Commissioner is a reminder of the age when the Establishment of the Church of Scotland made it vulnerable to the control and interference of the Crown. Today he or she does not contribute to debate *qua* Lord High Commissioner, does not appear on the floor of its chamber in that capacity, does not open or close the Assembly and does not convey the opinions of the Crown on the affairs of the Church. But he or she is part of the royal household, and in Britain's formal Order of Precedence the current Moderator also holds a very high rank. It was another example spotted by Barr of the state's support for the machinery of the Church's life, that the expenses of the Lord High Commissioner to the General Assembly are met from the Consolidated Fund of the United Kingdom.<sup>95</sup>

It is the monarchy, the pinnacle of the ceremonial element of the British constitution, which bears the most obvious element of the substantial or efficient support by the state for the Church and its government.

‘I, Elizabeth the Second by the Grace of God of Great Britain, Ireland, and the British Dominions beyond the Seas Queen, Defender of the Faith, do faithfully promise and swear that I shall inviolably maintain and preserve the Settlement of the true Protestant Religion as established by the Laws made in Scotland in prosecution of the Claim of Right and particularly by an Act for securing the Protestant Religion and Presbyterian Church Government and by the Acts passed in the Parliament of both Kingdoms for the Union of the two Kingdoms, together with the Government, Worship, Rights and Privileges of the Church of Scotland. So help me God.’<sup>96</sup>

The current situation is this: the monarch has taken this oath to implement throughout her reign the terms of the Acts referred to in its text, and this pledge she renews each year in writing or in person to the General Assembly. Meanwhile the Union settlement is the subject of constitutional debate, because the Act of Settlement precludes a Roman Catholic (but not a member of any other religion or of none) from becoming or marrying the monarch. In the spirit of anti-discrimination

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<sup>94</sup> J.P. Mackey, *Power and Christian Ethics* (Cambridge: CUP, 1994), p. 189

<sup>95</sup> J. Barr, *The United Free Church of Scotland*, (London: Allenson and co, 1934) ch XI, for examples

<sup>96</sup> The Oath of Accession

and anti-sectarianism that informs the debate, the question exists whether the Act of Security and the Oath above should be abandoned. Again the situation is unclear, for reasons that are familiar from the earlier discussion of this chapter. There exists the lifelong oath taken more than fifty times now by the current monarch, the Act upon which it is based, the inherent rights and privileges recognised by Parliament upon which the Act is based and, arguably, the claims of the Church itself to its own inherent rights. Is the removal of one of those elements, even the Act, fatal to any or all of the others? If, for example, the Act were repealed in the lifetime of the present Queen, what would become the status of her oath? Is she obliged to resist any developments in the ecumenical movement that might be deemed to constitute a departure from the form of Presbyterian Church government intended by the oath? Would such an obligation in her survive the repeal of the Act? If the Act is based on inherent rights and privileges (granted originally by Christ, not the secular sovereign) what becomes of them if the Act is repealed? (The same question pertains to the repeal of the 1921 Act.) Does the Church have to face the probability that an increasingly secular society has simply lost its recognition of these inherent privileges? Are the Crown Rights of the Redeemer no longer presumed by the legal and political establishment of Britain and Scotland? The Reformation itself exemplifies the ability of the secular order to re-align its religious allegiance and re-locate the perceived institutional authority of Christ. Could it happen again in a new way? And what, if all else fails, is the responsibility of the Church itself, the Body of Christ, to assert those rights if it still believes they exist? These questions demonstrate, in yet another way, that the apparently neat settlement of 1921 raises even more questions than it answered, and has survived only because there has been so little practical testing of the implications in politics, legislation or case-law.

Is the Church of Scotland established? Opinions vary, because some commentators fail to understand that the question is different from the same question asked in England, some are influenced by the remnants that remain, and others are convinced that the Church is truly, spiritually free. Perhaps it is fairest to conclude that there are building materials of the Establishment lying about undestroyed, but none that seriously impinge on the Church's legal life except when major constitutional change is discussed, and then ancient legal history – especially the 1707 Union – comes curiously to life again. The fragments of Establishment do not add up to the civil provision of religion that Calvin would have recognised: so in

*Reformed* terms Scotland does not now have the Establishment of religion, whatever a less theologically-informed legal view might conclude.

### Conclusion

The re-union of the fragments of the Church was brought about by the recognition, at last, of the inherent spiritual freedoms of Christ's Church. Since the Church had an existing legal structure, complete with powers of legislature, executive and judiciary, the spiritual freedom was presumed to be guaranteed by the legal machinery of the Church, a jurisdiction separate from, but co-ordinated with, the remainder of the legal machinery of the state. And since the sceptics around the process could not be persuaded that spiritual freedom was perfectly compatible with Establishment of religion, the latter had to be sacrificed, though the argument of this chapter has been that it was dismantled through force of circumstance, not the demands of logic.

The account so far has been careful thus to distinguish, as Chalmers did, the Establishment of the Church of Scotland from the question of the location of spiritual jurisdiction. This chapter has pointed to another important distinction. Mair's *Digest*, the principal nineteenth-century text book on Church law, distinguishes the independent spiritual jurisdiction of the Church from its spiritual independence<sup>97</sup> (the fourth Article Declaratory mixes them up together). The Church is spiritually independent of the state if there is a recognised area of its spiritual affairs that is not subject to legislation by secular law. The Church has an independent spiritual jurisdiction, on the other hand, if it exercises a juridical authority from which there is no appeal to civil law. One difference between these may be that their content is not identical, for example when the civil law leaves to the Church's regulation secular matters that are ancillary to spiritual ones:<sup>98</sup> in such an instance the matter is not inherently part of the Church's area of spiritual independence, but may be allowed to fall into its jurisdiction. The other main difference between the two is whether each

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<sup>97</sup> W. Mair, (posthumous) *A Digest of Laws and Decisions Ecclesiastical and Civil relating to the Constitution, Practice, and Affairs of the Church of Scotland* (Edinburgh and London: Blackwood, 1923), chapter I

<sup>98</sup> A contemporary example is the exemption of church interiors from planning law, and the regulation of church furnishing instead by the courts of the Church. Burleigh, the Church historian, maintained that the area of ecclesiastical discipline is not confined to purely spiritual matters: see J.H.S. Burleigh, *A Church History of Scotland* (Edinburgh: Hope Trust, 1983), chapter I



is necessary to guarantee the other. It would be admittedly pointless for the Church to have a separate legal jurisdiction if there was no spiritual independence for it to serve. On the other hand, it might be possible to protect the spiritual policies of the Church by means other than a legal jurisdiction that is modelled on the judicial sovereignty of the civil law.

As indicated before the beginning of this description of the process of pursuing union, the development of a ring-fenced spiritual jurisdiction is only one way to guarantee the preservation of spiritual freedom, but it is not the only way and should not go unquestioned, especially if it displays flaws and weaknesses. The principal weakness of the Two-States-like solution is that the question was never asked whether the Church had the kind of equipment a state needs to carry out its juridical functions. It was observed earlier that the Church is more like the state as social geometry than it is like the state as a sovereign being. It lacks, for example, a police force, a correctional system, and (since Church law is no longer regarded as part of a single Scottish legal system) a professional corps of defence lawyers for Church cases. The nature of the Church simply is not sufficiently the same as the nature of the nation state; and so the 1921 settlement declared – or required – the Church to act out of its inherent character in order to exercise its real inherent authority.

The Church of Scotland had now been liberated from the Divine Right of (secular) Kings and the resulting One-Kingdom theology; from federal theology; from patronage and Establishment and from the superior authority of the civil law in spiritual matters. Can we take for granted the legitimacy of the Divine Right of Church courts; a theology of two legal jurisdictions treated for practical purposes as two legal states and a co-ordination of those jurisdictions? Why, as Lee provocatively asked in 1844, must we locate the freedom of God in a sovereign General Assembly and how do we trace the exercise of God's sovereign will for the Church in Scotland? In other words, if the constitutional self-understanding of the Church has changed so much since the Reformation, why not identify and scrutinise the current constituent elements of that self-understanding as it currently exists?

These significant questions will be taken up later in the discussion of this thesis, once the important matter of the twentieth century evaporation of the Church's legal status has been addressed.



## CHAPTER FOUR

# THE UNRAVELLING OF THE CO-ORDINATED JURISDICTIONS

This chapter describes three sorts of pressures exerted on the Scottish Church-state settlement since 1929. The first part of the chapter is an examination of the limitations on the Church's own powers, including those imposed or recognised by post-1929 case-law involving the Church of Scotland. The second section describes threats to the independent spiritual jurisdiction from individuals and authorities who try to subject elements of the traditional jurisdiction of the Church to the civil law – as if the 1921 Act did not or should not exist. The third section demonstrates the recent predominance of human rights thinking and legislation, which challenges the Church to look in a new way at its legal relations with others. These three pressures make the 'Church and state' model of the 1921 settlement inadequate today as an explanation of the location of spiritual sovereignty; they have damaged the authority of the settlement and raised the question whether its underlying philosophy, of co-ordinated sovereignties, is still convincing.

For much of the last two centuries in the constitutional thought of the Church of Scotland, it has been the idea of co-ordination of two different jurisdictions that has prevailed in debate. Co-ordination is the concept used by Sir Neil MacCormick, the Hartian jurisprudent previously quoted, in the context of the diversification of civil jurisdictions.<sup>1</sup> The idea of co-ordination between Church and state was used by Lord Jeffrey in his dissenting judgement in the *Auchterarder* case before the Disruption.<sup>2</sup> The 1921 settlement, especially the language of the Fourth and Sixth Articles Declaratory,<sup>3</sup> enshrined that idea of a constitutional arrangement between sovereign institutions of Church and state, being the two parallel realms of the spiritual and the temporal. The idea that they have a relationship of co-ordination expresses the element of mutual recognition between and mutual restraint by each, as

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<sup>1</sup> MacCormick, *Questioning Sovereignty*, p. 8

<sup>2</sup> *Earl of Kinnoull and Rev R Young v Presbytery of Auchterarder*, cited in full and discussed in Chapter Three above

<sup>3</sup> The text of these two Articles is set out in the final chapter of this thesis.

each judicial authority recognises which subjects and cases belong within, and which beyond, its own jurisdiction.<sup>4</sup>

There appear to be difficulties with this model; they concern the sovereign nature of the national state, the sovereign competence of a state-like Church and the management of the co-ordination of the two. The many problems and inconsistencies enumerated in this chapter belong to one or another of these areas.

## 1. THE FRAGILITY OF THE CHURCH'S JURISDICTION

### Case-law after 1929

In Chapter Three above it was argued that the content of the ecclesiastical provisions of the civil law was unclear under the terms of the 1921 settlement: what pieces of legislation constituted the Church's legal foundation and how far that foundation could be changed by Church or state. Equally problematic is the relation between Church and state and the determination of the jurisdictional boundaries between them, and that effectively means the determination of the limits of the Church's independent powers. This weakness has appeared in the modern history of Church-related civil litigation, which is reviewed in this chapter.

It is an oddity of the Articles Declaratory that the only reference to the setting of boundaries between Church and state appears not in Article IV (concerning the separate jurisdiction) but in Article VI (concerning the spiritual responsibilities of the state and its relations of mutual well being with the Church).<sup>5</sup> In the absence of any criterion for separation in Article IV, it has been the habit of the courts to adopt the criterion of Article VI and conclude that both Church and state have a responsibility to determine their own jurisdiction. However, when agreement cannot be reached between them, the state assumes the power to determine the extent to which it concedes a separate sphere of sovereignty to the Church.<sup>6</sup> It has already been noted

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<sup>4</sup> J.M. Reid, *Kirk and Nation: The Story of the Reformed Church in Scotland* (London: Skeffington, 1960), p. 164

<sup>5</sup> In earlier drafts the two were a single article and tend to be treated as if they were one, quite illegitimately. When they were properly separated in the drafting process, it could be argued that the provision for boundary-setting should have been moved from what is now Article VI to what is now Article IV.

<sup>6</sup> Lyall, *Of Presbyters and Kings*, chapter V

that James Barr of the United Free minority anticipated this from the outset and believed it was a major flaw in the progress towards the Union, because it ultimately left the determination of powers in the hands of the civil magistrate, and the United Free Church minority could not accept that.<sup>7</sup>

Very few civil law cases in the twentieth century addressed the meaning of the 1921 Act and the Articles Declaratory. Those that did began to show how the co-ordination of jurisdictions worked in real life and especially in difficult situations.

The first major case to test the limitations of the Church's authority was *Ballantyne and Others v Presbytery of Wigtown and Others* in 1936.<sup>8</sup> In the exercise of its authority and responsibility, a local Presbytery had refused to give permission to a vacant charge for an immediate and unrestricted call of a new minister. The congregation (a former Established Church charge) was resisting the Presbytery's attempts to unite it with a congregation nearby (a former United Free Church charge). The recalcitrant vacant congregation resorted to civil law to try to force the Presbytery's hand by invoking the Church Patronage (Scotland) Act 1874, which they believed required the Presbytery to permit the calling of a minister without further ado.<sup>9</sup> The Court of Session judged that the rights under the 1874 Act were now in the competency of the spiritual court and so declined for itself any jurisdiction: the matter accordingly returned to the Church's courts and the congregation's attempt to invoke the civil law failed. The 1921 settlement had proved its worth in preventing a dispute belonging in one jurisdiction from being settled in the other. To this extent the case did no more than fulfil the intention of the original drafters of the legislation, and in all cases raised since *Ballantyne* the Church's lawyers have pursued the same outcome using the same arguments to avoid the civil jurisdiction.

In order to come to its judgement, the Court had to decide what was the content of the spiritual jurisdiction and so, in turn, how a civil court should go about deciding where the distinction lay. In the Second Division, Lord Aitchison referred

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<sup>7</sup> Barr, *The Scottish Church Question*, chapter XVIII/4

<sup>8</sup> 1936 SC 625

<sup>9</sup> In fact the congregation had not understood the intention of the Act, which was to ensure that no civil rights would improperly prevent a congregation calling a minister: it was not legitimate to interpret the Act to mean that a congregation had an absolute right to call when the obstacle was an internal legal matter within the Church's governance.

to the state's recognition of the inherent powers of the Church; and Lord Murray made the point that the cause was indeed relevant in the civil courts, to the extent that they had to decide what was the ambit of the Court of Session and what that of the General Assembly. The innovation in this case was contained in the judgement in the Outer House by Lord Pitman, who addressed the question of what exactly was included in the spiritual jurisdiction and concluded that it was not an easy classification to make. He decided the Church's authority extended over matters that were not of themselves naturally spiritual in the ordinary meaning, but which so adhered to the matters that were clearly spiritual that they should be included. (Modern examples of such an ancillary matter might include a judgement about buildings made in the course of a case concerning the re-appraisal and re-adjustment of parish units, or a financial implication of a case primarily concerning discipline.) This inclusion of ancillary matters to the core elements of worship, government, doctrine and discipline, not by exhaustive list – the judge was interested only in the particulars of the case before him – but by what was meant to be common-sense, left the spiritual jurisdiction less clear than it had been before. Case by case, the civil courts would have to decide not only what was 'spiritual' in terms of the 1921 Act but also what else might appropriately belong to the Church's courts to decide. That would make it very difficult to set or follow precedent, or to predict the outcome of future cases, or to know when the Church should try to invoke its own, independent authority. For this reason the Church has been lucky that it has so rarely been challenged in the civil courts: when that happens, there is very little case-law available to define the Church's area of independence and produce a clear outcome.

Sixty years passed before a second major case reviewed the condition of the 1921 settlement. In *Logan v Presbytery of Dumbarton* in 1995,<sup>10</sup> the pursuer sought a civil remedy in a situation where he believed that the Church's court was not properly exercising its powers; in other words, he requested a judicial review. In the Outer House judgement (which was not appealed) the Lord Ordinary Lord Osborne, an Episcopalian, held that judicial review was not possible in respect of an organisation that was not the creature of parliament. Whether such a judgement could have been reached in the post-Disruption years, when such a relationship of creature-hood was precisely the model argued by the main thinkers of the

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<sup>10</sup> 1995 SLT 1228

Established Church, is questionable. However, since the 1921 Act recognised the pre-existing powers of the Church as inherent and uncreated by Parliament or any human authority, the Court of Session disclaimed jurisdiction. Once again, on the face of things, the civil magistrate had acknowledged the distinctive and co-ordinated jurisdictions and the 1921 settlement had worked in favour of the Church. Once again the judgement went further than the basic point, and compromised the settlement a little further. The Court's opinion went on to expand on the duty of the civil court to determine the extent of the spiritual jurisdiction of the Church. It concluded that judicial review would be possible where the Church acted *ultra vires* in its interpretation of the Articles or its use of Article VIII (the stringent process for changing the Articles). The Court suggested that the ultimate sanction in the face of the Church abandoning its constitutional limitations would be the withdrawal of the original recognition (what Johnston had referred to as a 'grant' in the sense of acknowledgement) of the spiritual jurisdiction.

Lord Davidson, a former Procurator of the General Assembly and Court of Session judge, affirms this opinion in a Stair Encyclopaedia article<sup>11</sup> to the extent of saying that judicial review should be available if the ecclesiastical courts exceed their jurisdiction. It is easy enough to hypothesise a situation where a Church court might attempt to deal with a matter lying entirely within the civil jurisdiction, though difficult to imagine it happening in practice. If the Church tried to use its own law to deal with a straightforward employment matter that should have been governed by employment legislation, or in contravening health and safety legislation in the secular use of Church premises, it would be acting *ultra vires*. The Church's courts are not subject to the review of the civil courts when confining their concern to matters judged by those civil courts to fall within their spiritual ambit, but they are subject to the judicial review of a civil magistrate who decides they have exceeded their own jurisdiction and strayed into his or hers.

It is harder, however, to understand the Lord Ordinary's opinion that the misinterpretation of the Articles Declaratory – the overstepping by the Church of its constitutionally-recognised powers – could result in the withdrawal by the civil power of recognition of the spiritual jurisdiction. First, in such a circumstance there

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<sup>11</sup> Lord Davidson and R.A. Paterson, 'Church of Scotland' in *Stair Memorial Encyclopaedia*, vol III, p. 1501-1609 at p. 1505



is bound to be a disagreement, to the point of impasse, as to whether the Church has so overstepped its mark. Christopher Johnston made the point that a meaningful right of interpretation of the Articles must include the right to interpret them in a way the civil courts might not have approved. If the Church and the civil judiciary arrived at different interpretations of the same Article, the Church would claim it was entitled to take a controversial view, while the civil magistrate might regard the Church as wrong and therefore as acting *ultra vires*. The Church would refuse to accept that it had acted beyond its power, but the civil magistrate would treat it as if it had. With the substance of the spiritual jurisdiction unclear, because so little case law has emerged to define it, it would be very difficult to determine when the constitutional trigger had been activated and the settlement compromised in this way. Second, the Lord Ordinary's suggested censure in such an eventuality is puzzling. He meant either that the civil court should withdraw recognition of the Church's jurisdiction to the extent of the disputed subject, or that the civil court would have to withdraw recognition of whatever part of the Church's jurisdiction it believed the Church had abused. If he meant the former he was arguing circularly, because the civil court's belief that the disputed area did not belong to the Church was the origin of the dispute in the first place, so it does not cure the problem just to restate it. If he meant the latter, such a withdrawal of the recognition of jurisdiction seems a curious response: the mischief done is the overstepping of the boundary, so it would seem inappropriate to react by moving the boundary further back and punitively seizing part of the genuine area of the Church's own responsibility. It is not a true application of Lord Davidson's point about the protection of the different spheres; it is a resort to collapsing the difference under provocation. The function of the civil law should go no further than reinforcing the co-ordinates of jurisdiction and restraining the Church from acting outwith its own *vires*. If the *Logan* case is to be used as authority in future actions, it leaves the 1921 settlement contingent on the civil courts' opinion of the legal competency of the Church's courts' actions, and therefore leaves it terribly insecure.

Francis Lyall, an Aberdeen lawyer and Church elder regarded as a theological conservative, took a view very much like this part of the *Logan* judgement except that he applied it to a different part of the Articles Declaratory.<sup>12</sup> He agreed with the

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<sup>12</sup> Lyall, 'Religion and Law', p. 66-8



judgement of the Free Church case of 1904, and therefore regarded the Church as a legal institution without the capacity to change its fundamental theological identity. Most commentators have regarded the Free Church case as promoting a lack of spiritual independence, and therefore as an undesirable legal precedent. Lyall, on the other hand, supported the civil courts' right of judicial review, particularly in relation to the First Article, and believed that the civil courts must have the power to ensure that the Church did not divest itself of its basic identity by altering its fundamental doctrine and becoming something basically different. Though his conclusion was much the same as that of Lord Osborne in the *Logan* case, his argumentation promoted a resistance to theological change in the Church, and its effect would be the denial of the legal capability of the Church to self-determination and development, rendering it scarcely a legal person in any useful sense. The argument of this thesis, especially in Chapter Six below, adopts the belief that one merit of the 1921 settlement was that it promoted theological reformation over rigid doctrinal conservation.

The 1921 Act has always been regarded as a fundamental constitutional provision, because it was premised on recognition of the fundamental nature of the Church as an institution that must not compromise its obedience to Christ. The experience of litigation suggests, however, that some compromise is imposed on the Church from beyond it. *Ballantyne* affirmed the civil magistrate's right to determine the contours of the Church's jurisdiction; while *Logan* asserted a civil right of judicial review of the Church when it takes a different view of those contours, and suggests that the continued civil recognition of the independent jurisdiction is contingent on the behaviour of the Church's courts. Meanwhile, Francis Lyall would have the civil law judge the theological identity of the Church of Scotland exactly as the House of Lords did in *Bannatyne* in 1904. These cases return the Church to a position of dependency on the secular political and legal will which leaves it hardly more free than when it was Established. If the Free Church in 1843 gave up the benefits of Establishment in pursuit of a greater spiritual freedom they ultimately failed to secure, perhaps the Church of Scotland in 1921 did exactly the same thing for exactly the same motivation and with something like the same outcome. The settlement purported to acknowledge or grant the inherent, God-given jurisdiction of Christ's Church, but the civil magistrate quickly claimed the authority to declare the limits of that jurisdiction: the point is not necessarily that the civil magistrate was

wrong, but rather that the settlement was unworkable from the outset and this development in case-law was inevitable. The settlement had appeared to re-establish the Church as a sovereign authority, but left its external defences extremely weak.

However, it would not be fair to suggest that the two jurisdictions have entirely ceased to co-ordinate in the way intended by the 1921 Act, and one recent ecclesiastical case saw the legal theory work in both directions across the jurisdictional divide.

### ***Presbytery of Lothian v. Rev Ian Andrew***<sup>13</sup>

In July 2002 Rev Ian Andrew, the minister of a charge in the Presbytery of Lothian, was charged by Grampian police with an offence (sexual assault of a minor) serious enough to make it likely that his name would appear on the Sex Offenders Register in terms of section 5(2) of the Sex Offenders Act 1997. This would make it virtually impossible for the Church to continue his ministry. The Presbytery immediately implemented Act III 2001 anent the Discipline of Ministers (and others),<sup>14</sup> determined that there was a *prima facie* case against him in Church law and then sisted its process pending the outcome of the criminal case, leaving the minister on a technical, administrative suspension. In October 2002 Mr Andrew pleaded guilty to a slightly amended charge (attempted sexual assault of a minor) in Stonehaven Sheriff Court. The Sheriff deferred the passing of sentence (other than to place the offender's name on the Register) because, he said, he was mindful that the Church's process would now follow, possibly resulting in a heavy ecclesiastical censure of some sort, and he chose to await that outcome before completing the process in criminal law. The Sheriff<sup>15</sup> seems to have been highly conscious of the co-ordination of the two processes Mr Andrew was facing, and sensitive to the cumulative effect of the two outcomes in terms of sentence and censure. He appeared anxious to ensure that the minister would not receive excessive punishment

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<sup>13</sup> Neither the criminal nor the ecclesiastical process has produced any published reports, and this section is written from personal knowledge, as the author was Acting Principal Clerk at the time of these events. The judgement of the Presbyterial Commission is available for inspection from the Solicitor of the Church.

<sup>14</sup> This Act is referred to below, in the context of human rights legislation in the Church.

<sup>15</sup> For the avoidance of doubt, reference in this text to the Sheriff means the Sheriff at Stonehaven, and not the Convener of the Presbyterial Commission, Sheriff John Horsburgh.

by virtue of finding himself before two tribunals, and the deliberate choreography of the two procedures was rather striking.<sup>16</sup>

However, Mr Andrew then came to regret his guilty plea in the Sheriff Court, though too late to make a straightforward appeal against the process. When the case was brought to the Presbyterial Commission, the Church's body that hears disciplinary cases brought by Presbyteries under Act III, Mr Andrew ('the Respondent') obtained a further sist of Church process in order to return to the Sheriff Court and seek leave to alter his plea and proceed to trial on the facts of the case. The Sheriff resisted his motion, and proceeded to sentence him without waiting for the Church's next diet to take place. It has never been suggested that this implies a change of judicial view on the relation of the two processes, but it smacks more, probably, of exasperation with the minister. Indeed the sentence (a compensation order for £200) was not itself especially punitive; and everyone including the Sheriff seemed to be conscious that the real punishment would be the effect upon Mr Andrew's ministry of his name appearing, as it already did, in the Register.

When the Presbyterial Commission took up the case again in the Spring of 2003, the Respondent refused to admit the Presbytery's charge, despite its being careful to accuse him of having been convicted of the offence, not just of committing it. When they heard the evidence and delivered their judgement, the Commission members confined themselves to the question whether there was any reason for them not to rely on the criminal conviction. It is in theory quite a simple matter in circumstances like this. The burden of proof in the Church courts is the balance of probabilities, not the higher (criminal) burden of proof beyond reasonable doubt, and so it is to be expected that a criminal conviction, which has satisfied a more stringent test, will provide enough evidence to establish the charge against the Respondent on the Church's lower test. The Presbyterial Commission accepted the argument of Mr Andrew's counsel:<sup>17</sup> a conviction is not itself conclusive proof that the person

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<sup>16</sup> In private conversation the Solicitor of the Church Janette Wilson (who is clerk of the Presbyterial Commissions) has observed that there is nothing odd in any employer-equivalent sisting its process to await the outcome of the criminal case, nor in the censure of a professional tribunal being more devastating than the sentence of the Sheriff Court. The curiosity this argument maintains, probably unique to the 1921 settlement, is the bilateral nature of that co-ordination, notably when the Sheriff originally sisted sentence pending the Commission's hearings.

<sup>17</sup> Following the approach of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, and also in terms of section 10(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968

convicted did commit the offence, but it is *prima facie* admissible evidence of guilt, and would place a heavy onus on the convicted person to establish, on the balance of probabilities, his innocence of the Church's complaint against him. The conviction in one jurisdiction did not automatically guarantee conviction in the other, but certainly gave him a mountain to climb to prove his innocence. Mr Andrew's sudden contention that he regretted his plea in the Sheriff Court (because he had not entirely understood the implications of it in his whole circumstances) forced the Commission to satisfy itself that it was a secure foundation for the Presbytery's case. In due course the charge was indeed established, and censure passed in the form of a suspension of ministerial status without limit of time.

Though the co-ordination – indeed the virtual co-operation – of the different jurisdictions is vividly evident in this case, the subordination of the Church's authority emerges here again. It is impossible to conceive that the Presbyterial Commission would have found the criminal conviction unsafe: that would be tantamount to the Church's courts reviewing a case from the Sheriff Court, hardly an implication imagined in the Articles Declaratory. It is also difficult to imagine that the Presbyterial Commission would have pressed ahead with the proof diet if the Sheriff Court had accepted a not guilty plea or failed to convict Mr Andrew in a trial. It would be possible in theory for the Church, like any professional body, to proceed to proof and to find the charges established on the balance of probabilities; but the Presbytery would be unlikely to want to proceed following any collapse of the very criminal process that had triggered their action in the first place. The Church's pursuit of the matter was, in short, contingent on the outcome of the original police charge: in this case the spiritual jurisdiction was not exercised independently of the civil (i.e. criminal), but addressed the implications that resulted from the civil process, clearing up the spiritual fall-out of a secular conviction.

In such circumstances where both authorities recognise an opportunity for the co-ordination of their jurisdictions, the Church knows it cannot take the lead but responds to the initiative of the civil courts. It must consider itself fortunate when the civil magistrate does what the Stonehaven Sheriff did, apparently taking into account in his disposal of the case the parallel process in the Presbyterial Commission. In this case the problem was not lack of clarity in the boundary between the two jurisdictions – from the Church's point of view the transparency of the distinction throughout this case was heartening –, but the fact that the Church

could not really operate its own jurisdiction unless the civil magistrate (the Sheriff) exercised his. The Church's process was a dependent one, and so it was indirectly relying on the civil magistrate to enable the exercise of discipline over a minister.

### **The Church's Exercise of its own Jurisdiction**

There are problems, therefore, with activity that falls on the border between the civil and ecclesiastical jurisdictions, i.e. with the horizontal extent of the Church's area of sovereignty. There are problems too, however, with the exercise of authority within the Church's own sphere of competence, i.e. with the vertical relations of power within the Church.

The first difficulty is the fact that the Church hardly seems like a sovereign power when so few people in society regard it as having final authority over any aspect of their lives.

‘What happened was less that Scotland has suffered from having, in an aberrant epochal and regrettable moment, ‘lost’ its Parliament, but that the established church it gained gradually lost its dominance over the nation's life and its role as the national institution.’<sup>18</sup>

The Church of Scotland claims to be more than merely a voluntary association like many others, where members bind themselves to internal rules and effectively contract out of the civil law to an agreed extent and for restricted purposes. The Church's jurisdiction is defined only by subject matter, not by communicant membership, because the Church ministers to parish communities and not just to those whose names are on the communion roll. This makes it perhaps akin to military law: just as a civilian on a military base is subject to some extent to a different jurisdiction, so a member of the public at a Church service finds the experience regulated by the law of the Church. If, however, the law of the Church of Scotland cannot be applied with compulsion to someone who is not a member of the Church,<sup>19</sup> then the Church must give the impression of being in practice little more

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<sup>18</sup> B. Crick, ‘For my fellow English’ in Owen Dudley Edwards (ed.), *A Claim of Right for Scotland* (Edinburgh: Polygon, 1989), p. 153

<sup>19</sup> Clearly this has been the case to a certain extent for as long as it has been legally possible to belong to a different denomination, especially since the Toleration Act of 1712 and the Relief Acts of 1792 (Episcopalians) and 1793 (Roman Catholics). The discipline of the Church of Scotland remained for some time the ‘default’ system, as it were, within parishes for all those not actively associated with another recognised Church.



than a voluntary association like other associations and institutions of various sorts, including of course the other Christian denominations.<sup>20</sup>

The Church of Scotland recognised this reality in 1902 when it provided an alternative process to the Kirk Session discipline of individuals regulated by the Form of Process of 1707.<sup>21</sup> The Commission that promoted the change in the 1890s recognised that a compulsory, judicial procedure addressing mainly sexual offences had become obsolete and badly out of touch with the spirit of the age. The Act on Discipline in Kirk-sessions of 1902, section 4, prescribed that the ‘usual interrogatories’ should take place but that the Kirk Session might then refer the matter to the minister (and possibly one elder) who should proceed with ‘tenderness and seriousness’. The new process shifted the emphasis in personal discipline towards the pastoral intervention of the minister and away from the judgement of the whole Session<sup>22</sup> and the original system regulated by the Form of Process fell further into disuse as a result. Most Kirk Sessions today do not try to exercise this kind of authority unless the offence is a serious criminal one and the Church’s problem relates to the bearing of an office of trust by the individual – and most often the difficulty lies in the area of child protection.

In a celebrated case in the Church of England in August 2001, a minister refused to allow a couple to sing at their wedding hymns which he deemed to be inappropriate to the occasion. Suppose that had happened in the Church of Scotland: if the theory of the rules worked properly, such a couple in Scotland should either be bound by the decision, or should resort to petitioning the local Presbytery, because it is a matter of the content of worship and so it lies within the spiritual jurisdiction. Where the system tends to fail is not that people in such situations resort to civil law, but rather that they resort to finding another minister, and if necessary a minister of another denomination, to conduct the wedding according to their preferences. This

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<sup>20</sup> P. Seighert, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (Oxford: OUP, 1985), p. 17 talks of sovereignty as the autonomy of the prince both within and outside his domain. It would be difficult to justify the use of the concept of sovereignty in describing an institution that had only an internal authority, and this argument is extended significantly in Chapter Six, below.

<sup>21</sup> Act VIII 1902 on Discipline in the Kirk-session

<sup>22</sup> See S.J. Brown, ‘No more “Standing the Session”: Gender and the End of Corporate Discipline in the Church of Scotland, c. 1890 – c. 1930’, in R.N. Swanson (ed.), *Gender and Christian Religion, Studies in Church History*, vol 34 (Woodbridge: Boydell, 1998), pp. 447-460



demonstrates that the tradition of a clear geographic, parish-based jurisdiction does not work in an age where parish boundaries are increasingly ignored and religious pluralism gives people consumer choices. The jurisdiction of the Church is avoidable, because the Church of Scotland is not the only spiritual body available to meet people's needs, and so does not have the authority that comes with religious monopoly.

A second problem with the internal operation of the Church's sovereignty is its lack of continuity. The Westminster Parliament does not meet every week, but when it is in recess it can be recalled, and the sovereign body (Crown in Parliament) can be activated to deal with any situation. It has, therefore, the capacity to exercise its sovereignty whenever necessary. The supreme court and legislature of the Church, the General Assembly, meets for a week each year and does not continue in active existence from one year to the next. The Commission of Assembly<sup>23</sup> has specified powers that are quite extensive if used with imagination and flexibility, but they do not extend to a right to legislate and they do not include the right to determine or alter doctrinal matters. Normally that limitation does not matter, as the business belonging to the Assembly can be put off until it next meets (i.e. until the third week of May next). If such a matter did arise with greater urgency, there is no mechanism to deal with it. If sovereignty is understood in part as the power to order governance, and the supreme court of the Church is so dormant from one May to the next that it cannot resuscitate itself to deal with an emergency, it simply does not meet a self-evident test of sovereign authority. If the UK Parliament were, for argument's sake, to receive a Bill to repeal the 1921 Act, the officers of the General Assembly would struggle to react adequately and constitutionally within their powers. To put it bluntly, the Church of Scotland possesses at best a part-time effective sovereignty and it simply is not comparable to the state with whose jurisdiction it attempts to co-ordinate. If the Church deems the General Assembly to be its sovereign authority, it can claim only an intermittent exercise of sovereign power.

The third point about the exercise of the Church's legal authority touches a core theme of this thesis. Lord Mackay of Clashfern, the former Lord Chancellor

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<sup>23</sup> Act VI 1997 anent the Commission of Assembly

and a member of the Associate Presbyterian Church, expressed himself in quite Lutheran terms in observing:

‘The authority of the Church... is pre-eminently an authority to persuade; an authority to call for a willing hearty obedience, not an enforced obedience.’<sup>24</sup>

The behaviour of the courts of the Church of Scotland today<sup>25</sup> suggests that there is no desire to exercise a coercive authority, the kind of authority that would parallel that of the state. When, for example, a minister is found to have breached the standards of personal discipline expected of him or her, it is relatively unusual for the accused minister to demand that the offence is proven in terms of the recent legislation relating to the discipline of ministers and others.<sup>26</sup> Rather, the minister usually makes a confession that has been discussed beforehand with the investigating team from the Presbytery and they take this into account in promoting on the floor of the Presbytery a suggested outcome that is pastoral in its purpose and lacking in any element of retribution. Or when a member of a congregation commits an offence in criminal law that involves moral culpability, the Kirk Session will at most deprive him or her of any offices of trust held within the congregation, but will not usually add any censure to that imposed by the secular court. These examples show a commendable outlook widespread in the Church, being unwilling to use the coercive element of legal authority, and illustrating an abandonment of penal enforcement as the foundation of the Church’s jurisdiction. The law of the Church may still regulate the life of the Church, and occasionally attempt to regulate the engagement of others with the Church as an institution. It rarely behaves as a coercive authority, and rarely succeeds when it tries.

The final difficulty is an ecumenical one; how does the Church of Scotland operate the Articles Declaratory without appearing to seek some kind of advantage that other denominations do not enjoy? One is immediately suspicious whenever one hears, on the one hand, of the Church’s legal officials being determined to maintain the 1921 settlement and, on the other, of the same people diplomatically re-assuring

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<sup>24</sup> Lord Mackay of Clashfern, ‘The Law, the Word and the Head of the Kirk’, in S. Lamont, ed, *St Andrews Rock: The State of the Church in Scotland* (London: Bellew, 1992), p. 150

<sup>25</sup> This observation comes from regular personal experience of advising lower courts and receiving appeals etc

<sup>26</sup> Act III 2001

partner Churches in ecumenical engagement that the national Church seeks no special privilege that the others do not have. Most Churches in Scotland are treated by the law as voluntary associations, and the difficulty is finding the extent to which an ecclesiastical law exists that provides for a simultaneously distinctive – and yet not unduly privileged – national Church. The spiritual jurisdiction means nothing in Scots law unless it comprises something that is different from the substance of civil law but more than the internal regulation of just another voluntary association. Kirk Sessions no longer make theological judgements about moral behaviour within the parish, nor control education or poor law; Presbyteries are reluctant to enforce penal sanctions against wayward ministers; and the disciplinary tools of the Church are left unused even in face of increasing diversity of doctrinal belief. Spiritual independence has rarely to be asserted because the civil authorities would not dream of interfering with issues of worship, doctrine, internal discipline and the arcane minutiae of Church government. It appears that the special jurisdiction of which the national Church is so proud scarcely amounts to more than that of a voluntary association. Co-ordination of jurisdiction implies a plurality of sovereignties; today it is no longer clear in what meaningful way the Church still constitutes a sovereign authority, and a unique kind of spiritual authority at that. In Chapter Five, an unexpected discovery will be narrated, that shows there is a crucial difference between the national Church and the other denominations in Scotland, but it is not a difference that affects legal jurisdiction or the administration of justice by the courts of the Church.

To sum up so far: the Church's position is fragile in several respects both internal and external. The resolution of boundary-disputes is in the hands of the civil magistrate, who appears to have power to dismantle the settlement or review the more controversial actions of the courts of the Church. The Church exercises its discipline with deference to the criminal law, and so in ways that make it scarcely different from other professions. The authority of the Church is largely ignored, arguably non-continuous, unenforceable and no longer particularly distinctive.

To make things more worrying, the Church's traditional partner in the co-ordination of jurisdictions – the secular state – seems no longer to be a reliable presence.

## **2. THREATS FROM BEYOND THE CO-ORDINATED JURISDICTIONS**

The 1921 settlement is not an explicit treaty or contract, but consists of an Act of Parliament and its appendix. However, since these declare the relative spheres of authority of the Church and the British state and expresses the intent of each, it is helpful to regard it as an implicit treaty, having as its parties the Church of Scotland and the Westminster Parliament. Agreed long before British membership of the European institutions and even longer before Scottish devolution, the arrangement was simply bilateral, because the legislative authority of the civil law was located in a single place.

Chapter One above describes the diversification of sovereignty, both in terms of its location and in terms of its nature. Challenges to the spiritual independence of the Church of Scotland come in part from powers beyond the UK Parliament that cannot be entirely ignored. Recent events demonstrate that the Church's partners in the choreography of spiritual independence have changed since 1921, especially since Britain became part of the EEC, later the European Union.

### **The European Employment Directive, 2000**

Britain has been subject to European law for thirty years, but laws likely to compromise the interest of the Church as a legislative and judicial body have particularly emerged much more recently. In the summer of 2000, many European Churches engaged vigorously with the process within the European Union to introduce what came to be passed on 27 November as the European Employment Directive (2000/78/EC). The lobbying by ecumenical agencies and individual denominations concerned the possible effect upon Church life of the terms of the Directive, which addressed working conditions (including hours of work) and issues of fairness and discrimination. Many Churches anticipated that the Directive, which would be introduced to domestic law through Acts or Statutory Instruments of member states, would compromise the traditional freedoms and exemptions they had in respect of clergy; working hours, requirements of religious commitment in certain employees, and so on. After much discussion, much of it through a vast e-mail network, the Directive appeared, complete with an exemption for 'Genuine Occupational Requirements' (GORs). These were not defined with any exactness,

but provided a hook upon which Churches hung their arguments as they monitored the implementation of the Directive in domestic law.

In late 2002, the Department of Trade and Industry consulted widely, and particularly with the Churches, about the possibility of passing Regulations that would extend the rights of employees to ‘office-holders’. The British Churches were alert on hearing this, because one of the ways in which clergy have traditionally been exempt from employment law has been by deeming them holders of an office and not employees in the normal sense. The attitude of the different denominations during the conversations at the DTI was instructive.<sup>27</sup> The Roman Catholic contingent appeared to conduct itself as if they could not believe such a large and international institution as theirs could possibly be threatened by such a change and that the process was irrelevant to them, and they gave little practical support to the others. The Church of England, however, were much more alarming, because they gave the impression they believed their internal mechanisms were completely inadequate and were accepting the need for – and inevitability of – state intervention and regulation.<sup>28</sup> The smaller Christian denominations, especially the Reformed Churches, were very anxious that the Roman Catholic Church and the Church of England would damage their cause. These smaller Churches believed they offered what came to be termed ‘equivalence of protection’,<sup>29</sup> in other words provisions within their own rules and regulations that mirrored the safeguards that civil law gave to employees, and it was on the basis of this concept that the Church of Scotland made its written submission to the DTI.<sup>30</sup> At the time of writing no regulations have been passed in this respect. The question that is left in the

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<sup>27</sup> Private conversation with Rev Ann Inglis, Secretary (at the time) of the Legal Questions Committee of the Board of Practice and Procedure and the Church’s representative to the DTI consultation

<sup>28</sup> In the Spring of 2004, the Church of England will consider recommendations from Professor David McClean, the human rights specialist mentioned later in this chapter. These, if adopted, would improve the employment rights even of many parochial clergy and give them access to Industrial Tribunals in situations of dispute. The Established nature of the Church of England, and its regulation in part through the civil law, mean this is a natural way for that Church to address its own deficiencies in this area. The exploration of this thesis must be very different, because the Reformed polity of the Church of Scotland denies to any civil magistrate the right to adjudicate in some of the areas likely to be included in the new Anglican provision. (Personal conversation with William Fittal, General Secretary to the Archbishops’ Council.)

<sup>29</sup> Private conversation with Rev David Cornick, General Secretary of the United Reformed Church

<sup>30</sup> *Response by the Church of Scotland to D.T.I. Discussion Document on Employment Status in Relation to Statutory Employment Rights*, Board of Practice and Procedure, 2002



Churches' minds as they wait to discover whether the Regulations will eventually appear is whether such Regulations would offer protections that are intolerable to religious organisations, nothing like their own 'equivalent' measures and unacceptable when measured against the spiritual criteria that animate the Churches' internal legal processes. The Churches' problem would be justifying that difference in provision, since the areas in which such a difference would be desired by religious organisations are likely to be very controversial, as has already proved in the next sets of Regulations to be considered.

In December 2003, two pieces of secondary (Westminster) legislation outlawing employment discrimination came into force: the Employment Equality (Religion or Belief) Regulations (S.I. 2003 No 1660) and the Employment Equality (Sexual Orientation) Regulations (S.I. 2003 No 1661). A third set of regulations, relating to age discrimination, will come into force in 2006. Because the ultimate origin of these regulations was the Directive, the Church of Scotland has had to ask itself whether they constitute a circumvention of the 1921 Act and an imposition on the Church of something against which the customary arguments from *Ballantyne* will not be effective. Each of the first two Regulations is worthy of comment.

The Religion or Belief Regulations are meant to ensure that there is no religious discrimination except where a GOR exists, and naturally the questions are more complicated in the situation where the employer, and not just the employee, has a religious standpoint. Within the Church of Scotland there has been a difficult argument lying in the background for some years between those who think that some measurable degree of Christian activity or commitment is a GOR for all employees, and those who think it is a matter of degree, varying from role to role. For example, the Board of Social Responsibility has, in the past, insisted on active Church membership for all the employees in its care homes, even people whose tasks are menial and scarcely provide opportunities for spiritual leadership. Some other Boards and employing agencies do not consider such criteria at all. There are two problems in this for the independent spiritual jurisdiction. First, the Church as a whole, having several employing agencies, is incapable of deciding what is a spiritual requirement and what is not, and that throws into doubt the Church's ability to assert where the dividing line between sacred and secular lies, with obvious implications for the 1921 Act. Second, and no doubt because the interests of other Churches have to be considered, the provisions relating to GORs is built into the

regulations themselves: the protection afforded to the Church is not an exemption *from* the civil law, but an exemption *within* the civil law. To this extent the 1921 Act is redundant, because the spiritual freedom it guarantees is for this purpose provided instead by the new Statutory Instrument.

More contentious are the Sexual Orientation Regulations, which contain a further exemption recognising the offence caused to some religious organisations and their beliefs by homosexuality, and enabling such organisations to discriminate where:

- ‘(a) the employment is for purposes of an organised religion; [and]
- (b) the employer applies a requirement related to sexual orientation -
  - (i) so as to comply with the doctrines of the religion, or
  - (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers;’<sup>31</sup>

This can hardly be described a real GOR in the sense the term is otherwise used in both regulations; it is instead a concession to religious sensitivity that switches off the authority of the civil law, effectively extending religious jurisdiction to areas that do not otherwise fall on the religious side of the dividing line. The provision is controversial, because many people in the Churches are horrified and fearful at the thought that the exception would be utilised in their name, and beyond the Church there is a school of thought that the Regulations go further than the Directive intends.<sup>32</sup> In the context of this thesis it is significant because it grants in the secular law a form of religious freedom, and so it draws part of the Church's claim to spiritual freedom away from the Church's own governance and locates it entirely in the civil jurisdiction. If the *Ballantyne* case declared that there were non-spiritual matters that might properly be administered by Church law because they could not be naturally separated from spiritual questions, then these Regulations do the reverse, by drawing into the civil law an element of the provision of spiritual freedom to the Church. To say the least, the blurring of the boundary is made worse, albeit without any hostile intent by the civil magistrate in either case.

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<sup>31</sup> Section 7(3)

<sup>32</sup> In October 2003, the TUC publicly announced that it was co-ordinating a legal challenge to the provision of the concept of Genuine Occupational Requirement, and seeking to have the government's action judicially reviewed.

On the one hand, the incorporation of the Directive into domestic law pays no regard to the existing protection the Church of Scotland thinks it enjoys, whilst on the other hand it makes that protection redundant to the extent by which the new law provides equivalent protection in several areas.

Alongside this legislation that shows no sign of having much connection with the 1921 Act, the Church has recently faced an action from a Pursuer who has tried to blur the distinction of jurisdictions; doing so (perhaps bizarrely) regardless of the fact that she has resorted in turn to each of the jurisdictions with her legal argument.

***Helen Percy v Board of National Mission***<sup>33</sup>

In 1997 a minister, Rev Helen Percy, was facing a disciplinary charge brought by her Presbytery which had evidence suggesting that she had had sexual relations with a married Church elder, but the allegations had not yet been fully investigated nor judgement given in a Church court. She resigned ('demitted') her status as a minister with the approval of the Presbytery; but this removed her from the jurisdiction of that court for the purposes of the case and therefore brought it to an unresolved conclusion. There has followed ever since a series of actions pursued severally in both the Church's courts and at civil law.

In the summer of 1998, Miss Percy brought an action at an Industrial Tribunal, on grounds of unfair dismissal and sex discrimination, against the agency of the Church that had appointed her (she was not a parish minister). When the tribunal ruled that it had no relevant jurisdiction (for the traditional reasons outlined in e.g. *Ballantyne*) Miss Percy appealed, on the sole ground of sex discrimination, to an Employment Appeal Tribunal (in autumn 1998) and thereafter to the Inner House (First Division) (in spring 1999). The legislation on which she relied included the Sex Discrimination Act of 1975 and the Equal Treatment Directive of the European Union, and her arguments used themes of human rights based on gender.

In the *Percy* case the area of debate was the relationship of European Union legislation with the authority claimed by the General Assembly under the 1921 Act, and the implications for the Church's supposed spiritual independence. In argument

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<sup>33</sup>*Percy v. Board of National Mission*, Industrial Tribunal case S/300120/98, Employment Appeal Tribunal case EAT 1415/98, Court of Session judgement published at [www.scotcourts.gov.uk/opinions/LP2602](http://www.scotcourts.gov.uk/opinions/LP2602)

before the First Division, the pursuer's counsel argued that the court was obliged to interpret the 1921 and 1975 Acts "...so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter...".<sup>34</sup> The court did not determine the point, but the Lord President pointed out that to achieve this effect it would be necessary to assume that the European Union Equal Treatment Directive had the effect of implicitly amending s.3 of the 1921 Act, the section that affirms the civil jurisdiction while reserving the spiritual jurisdiction of the Church.<sup>35</sup>

There are two issues here: is the sovereignty 'granted' to the Church of Scotland qualified by sovereignty held by the European Union? And is it possible that the implied repeal of inconsistent Acts could apply to legislation passed later than 1921, or is it at least possible to argue the lesser and more diplomatic contention that the inconsistent parts of subsequent legislation are deemed not to apply to the Church?

In respect of the first of these questions, it cannot be presumed that the European Union would, by its own initiative, grant (i.e. acknowledge) in the Church of Scotland an inherent, independent spiritual jurisdiction, since this is not something that has been granted to (i.e. acknowledged in) any other denomination in the Union. If the European Union suffers any lack of authority over the Church of Scotland, it can only be because its own sovereignty is derivative, made up of part of the sovereignty of the British parliament transferred to the European institutions. The United Kingdom government cannot confer on someone else a jurisdiction that its own legislation denies to it. However important and powerful a state might be, the relevant question is its sovereignty.<sup>36</sup> This was the conclusion of the Employment Appeal Tribunal, despite an argument by the pursuer's counsel<sup>37</sup> that in effect contended that the state could be compelled by European law to redraw the bounds of the spiritual jurisdiction. If the judgement is correct, the European Union is obliged to recognise the spiritual independence of the Church of Scotland, just as it

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<sup>34</sup> *Percy v. Board of National Mission*, 1<sup>st</sup> Division judgement paragraph 25

<sup>35</sup> *Ibid*, paragraph 26

<sup>36</sup> J.A. Camilleri, and J. Falk, *Beyond Sovereignty?: The Politics of a Shrinking and Fragmenting World* (Aldershot: Edward Elgar, 1992), p. 83

<sup>37</sup> EAT report p. 6E

recognises its own lack of jurisdiction in respect of, say, a non-member state. This would be quite a different argument from one used by any other European Church to claim exemption from some part of the law; here the exemption is founded in a unique civil statute.

For Miss Percy's argument regarding the prioritising of legislation to have prevailed, one of the following contentions would have had to be accepted: (1) that the European Union enjoyed over the Church of Scotland an unfettered sovereignty of its own determining unlimited by restrictions self-imposed by the Westminster Parliament or (2) that the relationship between the Westminster Parliament and the European Union altered the relationship between Church and Parliament by withdrawing the legal privileges of the Church.

We have seen in respect of the *Logan* case that an argument can be made that the spiritual jurisdiction is a contingent benefit to the Church, so that in appropriate circumstances the state could withdraw its recognition and impose judicial review of the Church's activity. Brian Napier, counsel for Helen Percy, was making a different kind of 'withdrawal of recognition' argument; he was claiming that the Westminster parliament is obliged to fulfil the directives of the European Union and therefore that it may be obliged to interpret the 1921 Act in a manner that restricts the privilege that the Church has always had from it. The Procurator, Patrick Hodge QC, appearing for the Church's Board in the Inner House, countered that it was unreasonable to infer that a European Directive was intended to modify the 1921 Act implicitly; but this sounds a little hollow in respect of an Act which itself implicitly repeals other unspecified UK legislation.

On a related issue, the *Percy* case asked the same question but applied it to post-1921 domestic legislation rather than international treaties. In the original Industrial Tribunal, the pursuer's solicitor argued<sup>38</sup> that the exclusions and repeals referred to in the 1921 Act could apply only to legislation in force at the time the Act was passed. The chairman rejected this argument on the basis that the spiritual jurisdiction is a major claim and cannot relate only to legislation in force at that particular moment. This conclusion would appear to be a necessary one if it is allowed that the intention of the drafters of the 1921 Act was to devise a

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<sup>38</sup> IT report p. 8G



constitutional status for the Church of Scotland that would continue indefinitely, and history clearly suggests that that was the intention. The idea was that Parliament was declaring a spiritual area of non-sovereignty, over which it did not have the power to legislate and so in relation to which all legislation, existing and future, could not extend. The solicitor's argument assumed that the 1921 Act was only retrospective, but subject to modification by subsequent legislation and so contingent on future political will.

In the Inner House, the pursuer was relying on the argument that the 1975 Act should be interpreted as covering the case of employed ministers even if that required an implied modification of the 1921 Act, and that to do otherwise was to fail to transpose the Equal Treatment Directive adequately into domestic law. The Church's response was that domestic law is in this peculiar sense limited and the Church is immune from its provisions in certain circumstances.

As mentioned earlier, Francis Lyall, writing long before the *Percy* case occurred, had taken a conservative approach to the Church's legal capacity. He argued<sup>39</sup> that the 1921 Act should be interpreted so as not to conflict with prior statute, in other words that where inconsistency raises a doubt, the courts should wherever possible favour the pre-existing legislation. This argument could be applied also to subsequent legislation, which is what Mr Napier tried to do in the Inner House in the *Percy* case, and it raises generally the question whether the courts should take a minimalist or maximalist attitude towards the Church's jurisdiction. At one extreme the courts could interpret it as applying so narrowly to matters that are peculiarly spiritual that in practice nothing is excluded from the normal interest of the civil law, which would be contrary to the opinion expressed in *Ballantyne* about ancillary matters being appropriately within the jurisdiction of the Church. At the other extreme, the Church could be regarded as a separated jurisdiction for all internal matters including temporal ones, and independent of all civil regulation including new and apparently relevant laws. This thesis will later argue that a true Reformed belief in the dignity and responsibility of the civil magistrate makes it inappropriate for the Church to pursue its independence of jurisdiction beyond the traditionally defined areas of spiritual concern. The tiny corpus of case law does not

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<sup>39</sup> Lyall, *Of Presbyters and Kings*, chapter V

reveal how loosely and how generously the boundary is currently drawn, increasing further the uncertainty that is becoming a strong theme in this chapter.

The introduction for the first time in Church of Scotland case law of European law introduces a new set of difficulties into this discussion. Lord Mackay of Clashfern, the former Lord Chancellor, has noted<sup>40</sup> that the ratification of two Treaties has clearly compromised the sovereignty of the Westminster parliament and UK law: these Treaties are the European Convention on Human Rights (more will be said of this in the next section) and the Treaty of Rome. In 1921, it seemed clear that the ‘civil magistrate’ with whom the national Church had to deal was the nation state, its parliament and its legal system. The situation of the Church has become much more complex now that the secular sovereign has become compromised, qualified or fragmented. It raises the question as to how the Church is meant to develop constitutionally, but it also raises the fundamental question articulated in Chapter One above – that is whether the nation state is the only source of secular sovereignty and therefore the only authority with which the Church is trying to keep up its relationship of co-ordination.

However, the narrative of the *Percy* case does not end with her failure in the civil courts. The General Assembly of 1999 received from Miss Percy a Petition, the crave of which asked the court ‘to instruct an independent investigation to examine the actions of Angus Presbytery from June 1997, with particular regard to its decision to remove your Petitioner’s status in December 1997... [and then]... if fault be found with those actions, to revoke the decision of Angus Presbytery to remove your Petitioner’s status’.<sup>41</sup> The General Assembly felt that Miss Percy was at least stretching the conventional use of Petition in questioning the acceptance of a demission of status that the Petitioner had herself tendered in the first place. It agreed to hear the Petition, making clear that it was doing so only as an exercise of its *nobile officium* as the supreme court of the Church: the Assembly. However, upon the case being heard the crave was refused *simpliciter*.

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<sup>40</sup> Lord Mackay of Clashfern, ‘The Law and Christian Ethics: Yesterday and Today’, in *Law and Christian Ethics: A Series of Lectures on Ethical Issues Facing Society Today* (Edinburgh: St Andrew Press, 2001), p. 4-5

<sup>41</sup> *Volume of Reports and Papers of the Church of Scotland General Assembly of 1999* (Edinburgh: Board of Practice and Procedure, 1999), section C p. 7

Three years later, now using the surname Douglas, the former minister submitted a Petition to the General Assembly of 2002 with the crave: ‘to permit the Petitioner to state a claim for damages under and in terms of the Sex Discrimination Act 1975, and to adjudicate upon that claim following due process, and in accordance with the law’<sup>42</sup>. Since the Church’s agents had been successfully arguing throughout the civil process that the appropriate jurisdiction was the ecclesiastical, the Petition was clearly competent to that extent. The Assembly’s Committee on Bills and Overtures,<sup>43</sup> which gives guidance to the court on questions of competency and relevancy of judicial cases submitted to it, considered other issues relating to the matter. One was the fact that the incidents alluded to had taken place more than five years earlier, raising the question of prescription of the case and therefore of legal relevance; and another was the previous Petition brought to the 1999 General Assembly. Satisfied, however, that the demands of equity and the generosity of the Assembly made it appropriate to receive the Petition, the Committee decided on grounds of the delicate, sexual nature of the facts of the case that it should be heard privately by a small Special Commission. The Committee persuaded the Assembly to remit the case to such a Commission of three people, with full powers to dispose of the matter finally as if it were the court itself. The Committee took the opportunity to assert the separation of jurisdictions, an assertion approved by the Assembly and constituting the most recent opinion of the supreme court of the Church on the matter:

‘The Church being committed to gender equality and the protection of its ministers from discrimination on grounds of sex, the Special Commission should give due consideration to the principles contained in the Sex Discrimination Act 1975, whilst recognising that because of the exclusive jurisdiction of the courts of the Church to legislate and adjudicate finally in all matters of doctrine, worship, government and discipline in the Church, the Act does not form part of the law of the Church.

It seems to the Committee that in terms of the Church of Scotland Act 1921 the courts of the Church are the only proper jurisdiction to receive any application relating to the events referred to

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<sup>42</sup> *Order of Proceedings Papers* of the 2002 Church of Scotland General Assembly (Edinburgh, Board of Practice and Procedure, 2002), p. 40

<sup>43</sup> ‘Report of the Committee on Commissions (Bills and Overtures)’, in *Supplementary Volume of Reports to 2002 Church of Scotland General Assembly* (Edinburgh: Board of Practice and Procedure, 2002), p. 32/12-13

in the Petition of 1999 and the current Petition; and the Committee invites the General Assembly to endorse this view.’<sup>44</sup>

The Special Commission, a group of three legally-qualified Church members chaired by a Sheriff,<sup>45</sup> issued three Opinions between the General Assembly of 2002 that appointed them and October 2003 when the case was dismissed.

First, in October 2002, the Commission heard a group of procedural motions, which included an invitation to the membership of the Commission to disqualify themselves from hearing the Petition.<sup>46</sup> The Special Commission observed that Miss Douglas’ counsel had had every chance, at the time of the appointment of its members by the General Assembly, to object in that forum and had failed to do so. However, the Commission nevertheless treated the motion as competent and judged it on its merits, drawing parallels with similar cases in civil law, before rejecting the motion on the basis that no possible bias or personal interest had been demonstrated.<sup>47</sup> Had their decision been in favour of Miss Douglas at this stage, the effect upon the Church’s jurisdiction would have been devastating, and it might have prevented many other judicial processes of the Church from being exercised by Church members or office-bearers. That would frustrate the need for matters of worship, government, doctrine and (in this case) discipline to be judged by the Church according to its faith and obedience to God. External judges in internal cases could not possibly use the criteria that give the Church’s internal justice its particular Christian character and distinctiveness.

Second, in December 2002, the Commission heard a motion from the Petitioner seeking a ruling that the Sex Discrimination Act 1975 did apply to the respondents (i.e. the Presbytery of Angus and the Board of National Mission).

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<sup>44</sup> Supplementary Volume of Reports page 32/13

<sup>45</sup> Sheriff John Horsburgh, the same person who chaired the Presbyterial Commission that heard the case against Ian Andrew, described above; Rev Alistair McGregor, a retired minister and former QC; and Ms Jill Bell, Director of *Spectrum*, the Discrimination Law Service of Messrs Anderson Strathern WS.

<sup>46</sup> Opinion of the Special Commission in Petition of *Helen Douglas against The Presbytery of Angus and the Board of National Mission*, 7 November 2002, unpublished

<sup>47</sup> The most significant parallel was drawn with *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119. Lord Hoffmann, a judge with connections to Amnesty International, voted in favour of the extradition of ex-President Pinochet back to Chile, but his decision was successfully challenged on the basis that his involvement with Amnesty automatically disqualified him from hearing the *Pinochet* case.

Though the terms of the Commission's remit, agreed by the Assembly and quoted above, asserted that the Act did not form part of the law of the Church, the motion sought to show that the civil law did apply to Miss Douglas' circumstances after all. As the judgement commented: 'An assertion that the Act does not form part of the law of the Church is not a denial that the Church, may in certain circumstances, such as a relationship of employment, be subject to the provisions of the Act.'<sup>48</sup> As in the civil actions that had preceded this Petition, the fact that Miss Percy/Douglas had not been an employee was the main reason why this motion failed before the Special Commission. The interesting feature of this second motion was that the Petitioner was trying to argue a civil law case in a Church law tribunal, but she made no attempt to bring the substance of the case in Church law that the General Assembly had invited her to articulate. The Church had tried to set up an alternative method of settling the dispute, one based in a separate legal system, but the Petitioner brought only civil law arguments even to an ecclesiastical forum. Her legal advisers seem to have missed the point that the Church has not only its own judicial system, but also its own body of substantive law in the areas of its traditional independent authority.

Third, in September 2003 the Commission heard two motions: one from the Petitioner seeking directions relating to a referral to the European Court of Justice, and the other from the Respondents seeking the dismissal of the Petition because the Petitioner had failed to progress the matter or state the facts on which she proposed to build her case. The first motion of these two was dismissed, primarily because such a motion had been open to her to bring in the course of her previous, civil-law attempts to sue the Church, but she had not availed herself of the opportunity. In any case, her motion presumed that the General Assembly had authority akin to that of a nation state within the European Union, which the Commission judged the Assembly did not have. The second motion succeeded and the case was dismissed on 20 October 2003.<sup>49</sup> At the time of writing, Miss Douglas was reported in the press as intending to resort again to the civil law and pursue the matter to the House of Lords.

Both at civil law and in the judicial system of the Church, Helen Percy/Douglas tried to bring an argument based entirely in civil law, apparently

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<sup>48</sup> Second Opinion of the Special Commission in Petition of *Helen Douglas against The Presbytery of Angus and the Board of National Mission*, 24 February 2003, unpublished, (punctuation original)

<sup>49</sup> Third Opinion of the Special Commission in Petition of *Helen Douglas against The Presbytery of Angus and the Board of National Mission*, 20 October 2003, unpublished



oblivious to the fact that as a minister she had subjected herself to a different legal code for certain purposes; and throughout her case she tried to have the Church's own legal provisions set aside or ignored. Two things are concerning from the point of view of the preservation of the independent jurisdiction of the Church. First, the distinction between the two forms of authority appeared to hold, but only because the case ultimately failed in each jurisdiction on grounds that did not really have anything to do with the Church's independence (the fact that she was not an employee, for example, or her failure to pursue the case satisfactorily). Second, the legal arguments that prevailed were arguments of civil law, and the Church's unique kinds of argument – presumed and established in the 1921 settlement of Church and state – were never relied on in any judgement.

There is another kind of secular legal argument that the Church must anticipate having pled against it in future, and to this the discussion now turns.

### **3. HUMAN RIGHTS AS HUMAN SOVEREIGNTY: THE SECULAR ALTERNATIVE**

In the second half of the twentieth century, international agreements between sovereign states produced a large number of human rights-based treaties. These included the United Nations Charter; the UNESCO founding document; the Geneva Conventions; the Conventions of the International Labour Organisation; the founding treaty of the Council of Europe; and the Conventions and Protocols of the European Union and its predecessors. The important one for the present purpose is the European Convention on Human Rights, which is an instrument of the Council of Europe and important because it has been directly adopted into domestic UK law, in Scotland through the Human Rights legislation of 1999.

#### **The prevalence of human rights philosophy**

This section describes the contemporary prominence of individual human rights – as Chapter One demonstrated, a form of individually-located sovereignty – and its effect on the authority of the law of the Church. The treatment of rights in Chapter One was part of a discussion of political science, outlining how the nation state came to be regarded as the sovereign authority of the community. Here we turn

to the different question of rights as one of the threats to the extent of the jurisdiction of the Church of Scotland.

The enshrining of human rights in civil law (and indeed Church law<sup>50</sup>) is not a purely modern phenomenon. Rights *in re* and *in personam*, previously discussed, have always underlain private and public law, especially in the English tradition at least as far back as the *Magna Carta*. Until recently, the merits of people's inherent rights (to things like life, freedom and religious expression) have informed the legislature and judiciary, so that those entitlements were visible or implicit in constitutional law (e.g. the American Constitution), in statute law and in judicial opinions. Other constitutional laws, statutes and judgements were based on foundations other than rights arguments; and in the Scottish legal tradition they were often based on arguments of principle. Human rights, in other words, provided one part of the philosophy beneath any legal system, alongside other arguments that might include Natural Law, Divine Law, Marxist political thought etc. In the last forty or fifty years, however, several legal innovations have occurred that allow people to make legal claims *directly* out of their inherent personal rights. Conventions have been adopted that allow claimants to reach beyond domestic law and insist that their rights be guaranteed; and human rights have begun to be incorporated into domestic legislation in ways that prioritise them over other kinds of legal entitlements. Human rights seem set indeed to be 'the dominant ethic of the twenty-first century'.<sup>51</sup> If the model of sovereignty increasingly becomes a model of bearing rights, what are the implications for the Church's attempts to regulate itself and to relate to the broader community?

The argument of this chapter so far has been that the legal sovereignty of the Church is no longer an outcome of a simple bilateral relationship between Church and state, because there are pressures upon it from e.g. European law. If the Church has to take special account of the enshrined rights of individuals there will be more external pressures on its authority, because it has to decide which individual rights outweigh, in certain cases, the laws of the Church. These issues in turn raise three questions: first, does the Church recognise people's human rights as having divine

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<sup>50</sup> Tierney, *The Idea of Natural Rights* describes the period of the Reformation in terms of rights in Church law.

<sup>51</sup> E.D. Reed, 'Human Rights, the Churches and the Common Good', in *Political Theology* (2001) vol 3 no 1 p 9-21, at p.9

origin, so that they have to be acknowledged and respected?; second, to what extent and how might the Church be a bearer of human rights and take advantage of their benefits?; and third, to what extent is the Church a bearer of duties that correlate to other people's rights, and are those duties a fetter on its internal and external legal authority?

### The Source of Human Rights

‘Democracy may be a powerful safeguard against individual tyrants, but it provides no inherent protection against the ‘tyranny of the majority’.’<sup>52</sup>

An individual right recognised by law gives the holder a legal entitlement he or she can exercise against others, or an immunity against some part of the law that would otherwise apply to him or her, or an enforceable expectation of the conduct of others. It might be likened to a trump card that outranks ordinary cards, and it is itself not outranked except by a greater human right. Dutch Reformed theology describes human rights using the language of sovereignty, regarding them as little spheres of sovereignty protecting an individual,<sup>53</sup> and the application of sphere sovereignty to civil law by De Jouvenel and MacCormick was mentioned in Chapter One. Are such rights part of the divine order, and could God possibly recognise little spheres of sovereignty other than his own? Does God so design his human creatures that they come complete with inherent entitlements against him, each other or the rest of creation? Alternatively, does each of us receive only undeserved blessings contingent on the grace of Providence, and is it human arrogance to think we can insist on these gifts? Which is more significant: those origins of rights rhetoric that lie in the Christian religion and its Natural Law tradition; or those that are found in positivist, Marxist or sociologically-based schools of thought?<sup>54</sup> There are theological traditions on both sides of this debate.

Jürgen Moltmann is associated with the former position. His *On Human Dignity*<sup>55</sup> argues that human rights are the embodiment of human dignity, and human

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<sup>52</sup> Sieghert, *LawfulRights*, p. 25

<sup>53</sup> ‘The Government of Scotland’, in *Volume of Reports to 1989 Church of Scotland General Assembly* (Edinburgh: Board of Practice and Procedure, 1989), p. 149

<sup>54</sup> J. Shestack, ‘The Jurisprudence of Human Rights’ in T. Meron, ed., *Human Rights in International Law: Legal and Policy Issues*, vol I (Oxford: Clarendon, 1984), p. 75-85

<sup>55</sup> J. Moltmann, *On Human Dignity: Political Theology and Ethics* (London: SCM, 1984)

dignity is the product of humans having all been created by God, deserving equal respect because sharing the same fundamental origin, and therefore no-one (one infers from the argument) having any prior claim in the sight of God.<sup>56</sup> Moltmann argues that, in Reformed theology, the notion of covenant with God implies that humans are made in the image of God, and acquire their fundamental rights in that relationship. He believes that the Lutheran form of the argument is rather different, starting with the Two Kingdom theory and deriving human rights from human reason that is enlightened by faith.<sup>57</sup> Asserting that God is the giver of rights to all his human creation does not answer the question what those rights are, and Moltmann does not describe many of them in detail, devoting a whole chapter only to the 'right to meaningful work'.<sup>58</sup> There is no single source for Moltmann, or any other theologian, to consult. There is no authoritative list in Scripture or in the Church's doctrinal standards, and so the historians of rights theory have to look in several different places to trace the strands of thinking about human rights, including classical literature and philosophy, Greek and Roman democracy, the Old Testament creation narratives and the medieval rediscovery of the *ius gentium*.<sup>59</sup> This leaves the Church today with the task of assessing and evaluating each rights-claim made for it or against it, against whatever theological criteria it deems proper. There is no universally recognised, ecclesiastical criterion for dealing with these situations. If God created us with rights, he seems to have failed to leave a simple code of those rights for us to follow.

The opposite argument, that human rights are not wholly compatible with the sovereignty of God, is articulated by Bernard Plonger on writing from a Catholic canon law perspective.<sup>60</sup> He describes the reaction of the Church in the eighteenth century to the rationalist development of human rights thinking, and believes that a presumption of 'inherent rights' ignored the reality of sinfulness and grace in the human condition. If through sin the human individual is thoroughly undeserving and

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<sup>56</sup> Ibid, Meeks' introduction p. xi

<sup>57</sup> Ibid, p. 12

<sup>58</sup> Ibid, Chapter 3

<sup>59</sup> L. Swidler, 'Human Rights: A Historical Overview' in H. Kung and J. Moltmann, eds., *The Ethics of World Religions and Human Rights* (Concilium) (London: SCM, 1990), p. 12-13

<sup>60</sup> B. Plonger on, 'Anathema or Dialogue? Christian Reactions to Declarations of the Rights of Man in the United States and Europe in the Eighteenth Century' in A. Muller, and N. Greinacher, eds., *The Church and the Rights of Man* (NY: Seabury, 1979)

is restored by God through unmerited grace, how can he or she make any claims founded in his or her basic nature? The growing rhetoric of rights three centuries ago failed to take adequate account of the main element of the human relationship with God, which is duty not entitlement, and rights did not form any part of the theology of Covenant current at that time.

If the modern Reformed Church adopts this latter argument, that human rights are not inherent aspects of our created identity, then it has no reason to regard rights as more important than Christian duties, relationships, divine laws and other priorities that are theologically non-negotiable. Rights, in that case, would no more be little spheres of sovereignty than anything else is in face of the sovereignty of God. The Church, therefore, would not be faced with these irresistible qualifiers of its spiritual authority, though it might decide unilaterally to recognise the merit and adopt the protection of some widely accepted rights. As this has been the recent practice of the Church of Scotland, it will be discussed further, below, in terms of the correlative bearing of duties.

The Church, then, has two possible approaches to the existence of human rights. On the one hand, it can regard rights as part of the Eternal Law of God, or even more particularly of the Natural Law of God's Creation, and set about discovering what those rights are and how they affect the content and contours of the religious law of the Church itself. In that case human rights have to be accepted as part of God's plan for humankind and built in to the law of the Church. On the other hand, the Church may decide that there is a theological incompatibility between the sovereignty of God and the separate spheres of sovereignty attributed by rights theory to individual people. That would not necessarily mean dismissing the merits of particular rights, but it would mean understanding them differently. The privileges and entitlements that human rights confer would instead be regarded as part of God's sovereign will for his created people. The individual provisions could still be incorporated into the law of the Church, not because its members have any inherent right to them but because the Church believes that is how God wills people in the Church to treat one another. The effect may be the same in many cases, but the reasoning is entirely different.

The distinction works too where the whole Church is considering whether it can be the bearer of rights and a claimant of privileges against other people and institutions. The Church may believe that it is inherently entitled to certain kinds of



recognition or privilege or freedom because it is made up of human beings, and insist on being treated in a particular kind of way as a human institution. Alternatively, and this is certainly the experience of history, the Church may disregard human rights arguments and prefer to found its legal claims on its belief in the sovereign power of God, the ultimate authority that outranks human legislatures, human rights and every other kind of human claim.

### **The Church as a Bearer of Human Rights**

Article 9 of the European Convention (ECHR) states:

*‘Freedom of Thought, Conscience and Religion*

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights or freedoms of others.’

The question whether the Church of Scotland as an institution could be the bearer of the same Article 9 rights that belong to its individual members, depends on whether it has a corporate legal capacity for this purpose, and that capacity has not been established, though it has been much debated. There are two elements to this problem. The first is the observation already made that the Church of Scotland struggles to identify how it is a corporate legal entity. With the exception of the Presbyteries, none of its courts has continuity of existence; and those of its agencies that do have an ongoing legal identity (its Boards and committees, for example) are not normally involved in exercising the spiritual jurisdiction and are certainly not the location of legal sovereignty. The construction of the Church as a constitutional entity is perhaps too unusual for it to be able to make much of a claim based on anything other than its peculiar existing settlement in statute law.

The second issue is whether a corporation – even without the previous difficulty – could enjoy rights under the Convention. Alan Miller, the Scottish human rights expert, believes that the Scottish constitutional tradition regards the individual human person as standing in a community and asserts the principle of

groups and communities enjoying rights together.<sup>61</sup> The problem is that there is a difference between 600,000 individual Presbyterian Christians all claiming an identical individual right, and the Church of Scotland as a single legal person claiming the same right. Both of them comprise the same community, but they are not the same legal entity and the law treats them differently. What is not clear is whether corporate manifestations of the Church, for example its courts, could claim protection for their spiritual decisions from Article 9.

Rights conventions have almost always described rights in terms of human individuals, even when those human individuals are acting in association with others: rights are not normally ascribed to any corporate entity.<sup>62</sup> The Universal Declaration acknowledges that the rights of individual members of minorities can be exercised in common with other members of the same minority. It does not answer the question whether that minority can take a single action to assert the right of all its members, because it always uses the language of individuals pursuing their rights, possibly in concert with other individuals but never through corporate bodies.

The English legal thinker and rights expert David McClean, who served on the working group of the Conference of European Churches that examined rights questions in the late 1990s, formed the view that freedom of religion required three elements:

‘... freedom of individual belief; freedom to express that belief in association with others (e.g. in worship); freedom to maintain institutional expressions of belief (e.g. the churches)’.<sup>63</sup>

He pointed out that the ECHR covers only the first two of the three, and that it has always been difficult to apply the provisions of the Convention to what are termed ‘social’ rights.<sup>64</sup>

Another human rights thinker who brings a theological awareness to her analysis, Sophie van Bijsterveld, tackles this problem<sup>65</sup> and observes that the

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<sup>61</sup> A. Miller, ‘Human Rights Law’, in *Law and Christian Ethics*, p. 34

<sup>62</sup> Sieghert, *Lawful Rights*, p. 161

<sup>63</sup> D. McClean, unpublished paper on the CEC Working Group on EC Legislation, February 2000, second page

<sup>64</sup> *Ibid*, third page

<sup>65</sup> See generally, S. van Bijsterveld, ‘Religion, International Law and Policy in the Wider European Arena: New Dimensions and Developments’ in R.J. Ahdar, ed, *Law and Religion* (Dartmouth: Ashgate, 2000), p. 163-180

corporate nature of religious organisations is not a new issue. Whilst the Treaty of Westphalia, for instance, appeared to recognise the institutional dimension of freedom of religion by dealing with states rather than individuals, nevertheless in Enlightenment thought and early rights theories the rational focus was always on the individual, with the effect that modern rights codes tend to be expressed entirely in individual terms. In her own thinking she believes there is a place for social rights, and suggests that in this area of thought there are ‘strong theoretical challenges to the idea of the liberal paradigm.’<sup>66</sup> She concludes:

‘... religion also has social, institutional and communicative dimensions which should be taken into account by the law: structural or institutional arrangements transcending the individual-liberty approach are necessary... the role of the intermediary institutions reaches far beyond the dichotomy of the private individual and state within which national policy issues are still often set.’<sup>67</sup>

The appropriateness of a legal institution like the Church of Scotland being the bearer of human rights enshrined by law is theologically questionable given the argument from Plongerón’s thought set out above, but in any case it does not quite appear to have found its way into law. Until it does, the question whether there is merit in founding the spiritual freedom of the institutional Church on Article 9 of the Convention and not on Article IV of the Articles Declaratory, remains an academic one because the Church as a corporate body cannot have confidence that it would benefit from those rights.<sup>68</sup> Meanwhile, only the individual members of the Church acting singly or in groups can rely on Article 9 to protect their religious behaviour. The religious freedoms of the membership are protected to the extent achieved by the Convention, but it is not yet safe to expect a protection for the whole Church that would equal the protection originally afforded by the 1921 settlement.

### **The Church as a Bearer of Correlative Duties**

The other aspect of the human rights issue is how it affects the Church not as a prospective bearer of rights but as a sovereign whose authority may be trumped by

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<sup>66</sup> Ibid, p. 166

<sup>67</sup> Ibid, p. 175-6

<sup>68</sup> This question, though it is academic, is pursued in a sustained way in the following chapter, as possible future models of the Church’s jurisdiction are speculatively explored.

the rights of others. This relates to the spiritual jurisdiction of the Church rather than its spiritual independence.

The Treaty of Amsterdam, in its declaration on rights, says:

‘The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.’<sup>69</sup>

This was exactly the concern the Church of Scotland had when the idea was mooted in the Westminster Parliament that the European Convention on Human Rights would be imported into British law. In response to a question in the House of Commons, the then Scottish Secretary Donald Dewar gave the reassurance that human rights legislation would not interfere with the Church’s historic interest.<sup>70</sup> He could talk only in terms of political intention, not legal compulsion, and the question remains untested as to how the 1921 Act and the new domestic human rights laws would stand up in conflict with each other.

If Britain were to follow the example of those states that give precedence to the Convention provisions over its other laws,<sup>71</sup> could a rights-claim ever outweigh the recognition of the Church’s jurisdiction, to the extent that the civil courts would have to interfere with an ecclesiastical question? If the British courts were to regard rights not only in their status as legislated individual privileges but in the more philosophical sense as inherent qualities of the individual bearer, what is to prevent competition between the inherent constitutional rights of the Church and the inherent human rights of someone complaining against the Church? (This would be a return to the very conflict in claims that produced the pre-Disruption cases.) The outcome of such a contrast might be expected to lean in the direction of the individual and away from the larger institution. An entirely human-rights-based appeal by Miss Percy/Douglas could test the 1921 settlement beyond breaking point in the right political climate.<sup>72</sup>

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<sup>69</sup> Quoted in Bijsterveld ‘Religion, International Law and Policy’, p. 173

<sup>70</sup> F.A.J. Macdonald, ‘The Law and Theology in the Scots Tradition’, in *The Law and Christian Ethics*

<sup>71</sup> J. Polakiewicz, ‘The Application of the European Convention on Human Rights in Domestic Law’, in *Human Rights Journal* vol 17 (1996) 405-411, at 409-10

<sup>72</sup> Shestack, ‘The Jurisprudence of Human Rights’ in Meron, ed., *Human Rights in International Law*, p.72-3, points out the same problem referred to above about corporate identity – this time how to identify the legal personality of the bearer of correlative duties.

It is hard, too, to imagine an integrated political solution to address this problem. The constitutional questions are reserved matters under the control of the Westminster Parliament, but the implementation of the Human Rights legislation is a devolved matter in the Holyrood Parliament. It is possible to foresee the rights model becoming increasingly at the heart of legal thinking in post-Devolution Scotland, and with the kind of philosophical support alluded to by Professor Miller (see above). The effect would be the accelerating obsolescence of the ruler-sovereignty model that is behind the existing constitutional situation of the Church.

It would be a development, however, that the Church could hardly resist. In 1921, the Church benefited from the acknowledgement by the civil magistrate of inherent spiritual powers received directly from Christ. It would be difficult for the Church to object to the civil magistrate's acknowledgement of inherent rights belonging to members of the wider community, however hesitant the Church may be about the place of human rights within its own understanding of the divine sovereignty. In other words, in the years that have passed since the 1921 settlement, the underlying legal philosophies of the Church and the secular world may have drifted apart, because the world has increasingly tended to found its jurisprudence on the rights of individuals, while the Church has maintained its belief in the sole sovereignty of God. The world, however, expects the Church to recognise the rights claims individuals make, and to allow its authority to be qualified by them. In terms of the external, horizontal sovereignty of the Church, it cannot deny that the civil order recognises people's rights, so some degree of acknowledgement of this model is an unavoidable part of the relationship between the two jurisdictions.

It is a different question, however, whether the Church confers or recognises any inherent rights to those subject internally, vertically, to its jurisdiction. In theory it may deny the priority of rights, and in its preaching ask its members to forego their civil rights in favour of higher spiritual goods, but it is unlikely to be popular in refusing to those subject to its jurisdiction the privileges they enjoy in civil law. Many voices in the literature on human rights call for the Churches to give the witness of good practice in their internal affairs, and chide them for their failures, the times when their witness to the world is contradicted by an internal 'counter-



witness'.<sup>73</sup> The Roman Catholic canon lawyer Knut Walf, for example, points out that the legal structures within his Church parallel the authoritarian models of a state, and so they must be challenged whenever the *Codex Iuris Canonici* makes inroads into basic human rights.<sup>74</sup>

The Church of Scotland has not ignored this pressure nor, to its credit, has it failed to notice the intrinsic merit of the provisions of the Convention, particularly Article 6 that relates to fair judicial process. Recent General Assemblies have begun unilaterally to introduce into the corpus of the Church's law appropriate elements of the Code, doing so out of recognition of the merit of the right at issue, not out of any legal obligation. In 2000 an Overture was introduced that aligned the disciplinary code of the Church with the standards of Article 6, and in 2001 this became an Act of the Assembly replacing the Act VII, 1935 anent Trials by Libel.<sup>75</sup> The Church did not concede that the old Act denied anyone his or her rights, but recast those rights in ways that were more immediately recognisable as compatible with the Convention. In 2001 the Assembly agreed to the suggestion that Kirk Session meetings should be held in public except where, on cause shown, business was required to be taken in private to protect some greater right; this presumption reversed the existing situation and reflected the nature of the business of the modern Session. In 2002 this principle was extended to the meetings of the Boards and Committees of the Assembly. It could be said, therefore, that the Church is copying the state in choosing to absorb into its domestic laws the provisions of the Convention, though its peculiar nature and limited responsibilities means that it does not need to do so on such a grand scale.

There is, then, an awkward and rather tentative relationship between the Church of Scotland and the civil law's increasing absorption of a rights-based philosophy. It demonstrates an emerging contention of this thesis so far. Different legal systems have different under-girding philosophies, especially in answering the question of where ultimate sovereignty is located. The Church of Scotland and the state have historically been in opposition whenever their beliefs about sovereignty

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<sup>73</sup> J. Coriden, 'Human Rights in the Church: A Matter of Credibility and Authenticity' in Muller, and Greinacher, eds., *The Church and the Rights of Man*, p. 68

<sup>74</sup> K. Walf, 'Gospel, Church Law and Human Rights: Foundations and Deficiencies' in Kung and Moltmann, eds., *The Ethics of World Religions and Human Rights*, p. 40-1

<sup>75</sup> Act III 2001, under which Ian Andrew was prosecuted by his Presbytery; see earlier.

have differed, and have been in harmony whenever their views have coincided. The 1921 settlement was in theory a point of harmony and great simplicity; but it was a harmony built on a shared philosophy that is no longer the one to which the secular order subscribes. There is no realistic hope of recovering the uncluttered agreement of eighty years ago.

## **Conclusion**

The covenant between Church and state, insofar as it was enshrined in the settlement of 1921, was flawed in a multiplicity of ways, and has steadily if quietly unravelled in the years since the arrangement was struck. Chapter One has outlined the changes to the philosophical and jurisprudential concept of sovereignty in the civil order; and Chapter Three along with this chapter have narrated the constitutional changes to the Church of Scotland before and since the Union of 1929. Many sociological and historical arguments could be advanced to show that Scottish society has changed as much as the Scottish Church has in the last eighty years. It cannot be presumed that the social, political and legal relationship between the two has not also changed in that time.

First, the intrinsically flawed nature of the 1921 Act and the way it has been applied in subsequent Court of Session actions imply that the state's 'grant' of spiritual independence is not final and unconditional, that the freedom of the Church is contingent on its own behaviour, and that its constitutional position is more precarious than it likes to believe. Second, the sovereignty in the civil sphere is not simple or monolithic, but fragmented, developing and complex. A spiritual jurisdiction that depends on what is effectively a treaty with a power that is no longer the only relevant secular authority is an eroding jurisdiction that has no answers to some of the modern questions being asked of it. Third, the contemporary fashion for individual human rights does not yet give privileges to the Church because it would have difficulty asserting its legal competence to be treated as a bearer of rights. The undeniable little spheres of human sovereignty produced in this model provide new partners in the co-ordination of authority and legal responsibility.

The 1921 settlement survives, at least in theory, but it has lost the foundation of the understanding of Church-state relations on which it was built. The next part of the thesis offers theological discussion of a new understanding to replace the flawed one, seeking a basis of freedom that is not a re-working of secular sovereignty, and a

co-ordination with civil power that resists the temptation to copy the nation state and parallel the coercive authority of the temporal magistrate. This will require new theological, legal and constitutional foundations, or the recovery of very old ones. Chapter Five will ask whether it is likely that the 1921 Act will remain the centrepiece of the Church's legal identity, in the view of contemporary expert commentators. Chapter Six will offer one model of sovereignty that could provide a new intellectual foundation for the settlement, one that requires only a little alteration of the terms of the Articles Declaratory and none in the text of the 1921 Act.

## **CHAPTER FIVE**

# **LEADING PROTAGONISTS: FOURTEEN ELITE CONVERSATIONS**

### **Introduction**

There is a significant problem with scholarship in the area of the Church of Scotland's legal situation. For about seventy years after 1921, the constitutional settlement of that year did not produce much debate; Church historians and theologians hardly ever wrote about it; civil lawyers scarcely gave it a thought; and there were virtually no cases exploring in detail the boundaries between the civil and ecclesiastical jurisdictions. Then, in the last ten years, there has come the flurry of activity described in Chapter Four, intimating that the future security of the 1921 Act is far from certain and producing for the Church the questions this thesis has so far explored.

The thesis has approached the subject using the disciplines of legal philosophy, constitutional law, Reformed theology and historical analysis to produce conclusions about the current health of the Church's sovereign jurisdiction. Meanwhile in the life of the Church, the practical challenges described in Chapter Four put pressure on the officials of the General Assembly and the officers of the civil law to work out the future development of their constitutional relationship. The underlying question of this chapter, therefore, is this: do the overall arguments of this thesis accord with the views and expectations of some of the major protagonists in the field of Church law and Church-state relations, or does this thesis conflict with the practical experience and political will of those who are best placed to influence the field?

This question could best be answered by consulting the experience and observations of the personalities most closely engaged with the questions, and the principal experts in some of the relevant disciplines in Scotland, with a view to finding out the most authoritative and significant contemporary views on the themes addressed in this thesis. Their practical experience in Church leadership, politics and public life provided the practical evidence that illustrates and confirms where the problems lie and what the Church's future approach should be.

After the other research was completed, fourteen conversations were held, seven of them with men holding office within the Scottish Churches and seven with men whose remit was a civil legal or political one (though most of these were either Church members or at least were noted for their goodwill towards the Church). Only one individual declined the request for a conversation, on grounds of the constraints of a political office held.

The conversations all had two characteristics. Firstly, they could be called ‘interviews’, to the extent that questions were asked and answered and there was a high degree of overlap in the topics and issues put to those who participated. Secondly, they could equally well be called ‘dialogues’, to the extent that the interviewer did not confine herself to questions, but used the encounters as an opportunity to articulate ideas and debate points with the interviewees. This was an unconventional approach, but appropriate in the unusual circumstances of the research. The author (i.e. the interviewer) occupies a position within the legal structure of the General Assembly<sup>1</sup> and it would have been difficult to achieve with the interviewees – many of the fellow-protagonists in that arena – the pretence of an impartial researcher asking neutral questions. The policy chosen meant that some of the recorded conversations are dialogues between pairs of protagonists in some of the current debates, with the author being a constant in each. This provides a richness and variety of material that is different from the more sterile exercise of asking pre-determined questions.

There were three main categories of interviewees. One group consisted of officials of the Church of Scotland responsible for Church-state questions: these were the Principal Clerk to the General Assembly, the Procurator, the Scottish Churches’ Parliamentary Officer, a former Moderator (and Dean of the Chapel Royal in Scotland) and the Convener of the Church and Nation Committee. A second group consisted of current and recent officers of state exercising responsibilities on behalf of the civil magistrate: these were the Justice Minister then in office, a former Lord Chancellor, a former Lord High Commissioner and an MEP. A third group represented other major denominations in Scotland and included the current Primus of the Scottish Episcopal Church and his immediate predecessor, a Roman Catholic Bishop and the former convener of the Executive of the Constitutional Convention.

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<sup>1</sup> Depute Clerk of the General Assembly



A further conversation was held with a professor of sociology. There was no statistical intent in this project, because it was a piece of qualitative research to discover individuals' ideas and responses; therefore the absence of any women on the list of conversation partners was immaterial and unintentional, since there was no attempt to impose any kind of statistical control or criterion on those chosen except as explained above.<sup>2</sup>

The interviewees were: /

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<sup>2</sup> The individual mentioned as having declined an interview was a woman, so it would not be true to say that none were approached.

**List of interviewees, giving title and status as at the date of the conversation**

**Rev Dr Graham Blount** – 18 Dec 01 – Scottish Churches' Parliamentary Officer

**Professor Steve Bruce** – 6 Mar 02 – Professor of Sociology, University of Aberdeen

**Rt Rev Bruce Cameron** – 11 Feb 02 – Bishop of Aberdeen and Orkney, Primus of the Scottish Episcopal Church of Scotland

**Rt Rev Mario Conti** – 11 Feb 02 – Bishop of Aberdeen (Roman Catholic)<sup>3</sup>

**Very Rev Dr James Harkness** – 22 Jan 02 – Moderator of the General Assembly of 1995, Dean of the Chapel Royal, Chaplain General (Emeritus)

**Patrick Hodge Q.C.** – 14 Dec 01 - Procurator to the General Assembly

**Lord Hogg of Cumbernauld** – 20 Mar 02 – Lord High Commissioner to the General Assemblies of 1998 and 1999

**Rt Rev Dr Richard Holloway** – 1 February 2002 – retired Bishop of Edinburgh and Primus of the Scottish Episcopal Church

**Professor Sir Neil MacCormick M.E.P.** – 21 Dec 01 – Leverhulme Research Professor and Professor of Public Law and the Law of Nature and Nations in the University of Edinburgh, and S.N.P. M.E.P.

**Rev Alan McDonald** – 12 Feb 02 – Convener, Church and Nation Committee of the General Assembly

**Rev Dr Finlay Macdonald** – 20 Dec 01 – Principal Clerk to the General Assembly and Moderator-Designate of the General Assembly of 2002

**Rt Hon Lord Mackay of Clashfern** – 20 Mar 02 – retired Lord Chancellor of Great Britain and Ireland

**Rt Hon Jim Wallace Q.C., M.S.P.** – 29 Jan 02 – Justice Minister and Deputy First Minister in the Scottish Executive<sup>4</sup>

**Rev Canon Kenyon Wright** – 14 Feb 02 – had been Convener of the Constitutional Convention

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<sup>3</sup> Very shortly after the interview, Mario Conti became Archbishop of Glasgow

<sup>4</sup> Until after the Scottish election of 2003

Following the methodology recommended in Seldon and Pappworth's *By Word of Mouth: 'Elite' Oral History*<sup>5</sup> the author asked each interviewee to complete a form indicating the extent to which he would be willing to be quoted in this thesis or elsewhere, and the basis on which he was willing to allow the recording of the conversation to be archived in the library of New College and consulted by others.<sup>6</sup> It is important to acknowledge the generosity with which each individual completed the form, always explaining the particular circumstances leading to any restriction on his permission. This chapter is written within those few constraints, with retrospective consultation of individuals where necessary to ensure each agreement has been respected. The recordings that are permitted to be archived will be submitted to New College at an appropriate point in the academic process, along with notes relating to the limitations on their future use and a key to the conventions adopted here for track-marking of the mini-discs.

The conversations were based very loosely on a list of questions to ensure some degree of comparability among them, and addressed three main areas. One (see Section 1 of this Chapter) was the notion of sovereignty and the question whether a construction of sovereignty for a particularly Scottish and Christian purpose, like the task of this research, should expect to have particularly Scottish and Christian element. A second theme (Sections 2 and 3) was the separation of Church and state as articulated in the Fourth Article Declaratory and the 1921 Act, and exploration of this area included consideration of the provisions of human rights law as a possible alternative source of protection for spiritual freedoms in law. The final topic (Section 4) was the continuing relationship between Church and state as expressed in the Sixth Article, and the question of the degree to which the concept of Establishment survives in the modern national Church.

Not all the interviewees had expertise in all of these areas, and so some of the recordings do not address every question. In particular, interviewees with no legal training and colleagues from other denominations did not contribute much in interpretation of the 1921 Act and relevant case law.

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<sup>5</sup> A. Seldon and J. Pappworth, *By Word of Mouth: 'Elite' Oral History* (London: Methuen, 1983)

<sup>6</sup> See the Appendix to this chapter for the *pro forma* basis of agreement for citation and archiving used.

The ordering of the conversations was largely in the hands of the partners themselves. Frequently a connection was made with a topic that had not yet been raised by the author, and the natural course of the conversation was largely followed. The default pattern used by the author appears most clearly in recordings of conversations with individuals working professionally in the same field of Church law as hers and tending to display similar trains of thought.

From time to time, a sequence of questions and answers recurred between different conversations, and often these were at points when the interviewees were being pressed on what Bishop Holloway called ‘a neuralgic point’. *To give a flavour of the conversational nature of this part of the research, some of the issues in this chapter will be introduced interrogatively, with questions shown in bold italic type, like this.*

## 1. THE NOTION OF SOVEREIGNTY

### **A Scottish Notion of Sovereignty?**

The writings of George Buchanan and Samuel Rutherford referred to earlier in this thesis, and the flavour of Scottish historical documents<sup>7</sup> from the Declaration of Arbroath to the three Claims of Right (of 1689, 1842 and 1989), suggest a tendency to express sovereignty in Scotland in terms of the sovereignty of the ruled (the people) under God, and to emphasise the consent of the people as the source of political authority. If a further modelling of sovereignty for the Church’s purpose is to be attempted in this thesis, it will be important to know whether there are any such cultural expectations that will have to be borne in mind. *Is there today a peculiarly Scottish understanding of the concept of sovereignty, different from the traditional Westminster rhetoric of ‘the crown in parliament’?*

In general, non-technical terms, a Scottish reflection on ‘sovereignty’ focussed on people rather than on law or geography. Bruce Cameron, the Episcopalian Primus, talked of the Scottish idea of sovereignty as relating to the

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<sup>7</sup> See G. Donaldson, *Scottish Historical Documents* for documents earlier than the 1707 Union of Parliaments, and O. Dudley Edwards (ed.), *A Claim of Right for Scotland* for the 1989 Claim of Right

community more than to the territory,<sup>8</sup> and Mario Conti, then Roman Catholic Bishop of Aberdeen, talked of a familial model with overtones of clansmanship.<sup>9</sup>

Those who were legally trained addressed the distinction between the legal theory and the political or spiritual expression of popular sovereignty. They pointed out that the Scots negotiating the 1707 Treaty recognised that after the Union the legal position would involve the supremacy of the crown in the Westminster Parliament, an adoption of the traditional English model of sovereignty.<sup>10</sup> Indeed the efforts in advance to entrench the 1707 provisions, especially to prevent its religious aspects being reversed, indicate the acceptance then of a new constitutional reality.<sup>11</sup>

The strongest support for a uniquely Scottish theory of popular sovereignty came from those who had been involved in the 1989 Report of the Church and Nation Committee of the General Assembly.<sup>12</sup> The Report affirmed the notion that the Scottish approach to democracy was due to the Presbyterian genius<sup>13</sup> of the pre-Union period, and maintained that this model informed the arguments that preceded the re-establishment of a Scottish Parliament in 1999. According to Kenyon Wright, who chaired the Executive of the Constitutional Convention after the 1989 Claim of Right, the Convention began its work from the basis of a belief in limited and shared sovereignty under God.<sup>14</sup> The resulting modern Scottish Parliament cannot, however, be sovereign:<sup>15</sup> its devolved status, and the reservation to the Westminster Parliament of many responsibilities, including all constitutional matters, mean that it is always legally contingent on the will of the UK Parliament, however hard its proponents – and the Scottish political process – have tried to make its establishment irreversible.<sup>16</sup>

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<sup>8</sup> B. Cameron track 2

<sup>9</sup> NB: references in the text to Archbishop Conti do not have track-numbers, as the conversation did not have archive-permission and the recording is to be destroyed after this use.

<sup>10</sup> N. MacCormick track 2, J. Mackay track 8, P. Hodge track 2

<sup>11</sup> K. Wright track 10

<sup>12</sup> G. Blount track 2, A. McDonald track 2

<sup>13</sup> A phrase used by R. Holloway track 2

<sup>14</sup> K. Wright track 2

<sup>15</sup> J. Wallace track 2

<sup>16</sup> K. Wright track 5



One theme, however, that was constant in the context of popular rhetoric about sovereignty and about its practical, constitutional limitations, was the idea that the consent of the people is more precious and inalienable than any other element of sovereignty, and it was a theme brought up without prompting by people whose interest was quite varied.<sup>17</sup> It was mentioned as a technical requirement in the context of constitutional change, but also more generally in relation to the service-mentality of people in positions of political power.<sup>18</sup> The politicians amongst the group all expressed a sense of public service, not an inherent or divine or absolute right of rule. Though such an attitude was the hope, for the Scottish Parliament, of the Constitutional Convention,<sup>19</sup> it clearly exists among politicians with experience in the British and European Parliaments as much as the Scottish one. It is an exercise in political sensitivity not monopolised in a peculiar, Scottish political philosophy.

The conversations suggest that the idea of political sovereignty in Scotland still includes a historical self-understanding of the power of self-determination of the whole people, along with an awareness of the proper limitation of powers. Scots, however, acknowledge a legal reality that places constitutional questions ultimately within the authority of the processes of the British parliamentary system and the unwritten elements of its constitution. There was a general willingness to ascribe the instinct for self-determination to the traditions of political science in post-Reformation Scotland. As Dr Holloway, former Episcopalian Primus, put it, the Scots seem to him to be ‘less seducible into the ways institutions can take people over morally’.<sup>20</sup>

If a future modelling of the Church’s constitutional foundations does not incorporate an element of popular consent borrowed from the long tradition of Scottish political theory – and the Church of Scotland is weak in that regard –, a difficult argument needs to be made to defend the Church’s polity against broader political expectations.

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<sup>17</sup> G. Blount track 2, P. Hodge track 4, J. Wallace track 2, M. Conti.

<sup>18</sup> G. Blount track 3, J. Wallace track 3

<sup>19</sup> B. Cameron track 3

<sup>20</sup> R. Holloway track 3

### A Christian Notion of Sovereignty?

*Is there an understanding of the concept of sovereignty that is peculiarly Christian?* The rootedness of Scottish political science in the tradition of Presbyterianism formed part of the answer. Most of those interviewed believed there was a Christian concept of sovereignty, to the extent that Christian people brought their faith in God to their thinking about authority in this world. However, those who had experience of applying their beliefs to the movement for a Scottish parliament through the Constitutional Convention and the thinking of the late 1980s<sup>21</sup> did not see any great distinctiveness in Christian thought on the matter; as if their experience of the co-operation of religiously motivated campaigners and others had blurred any distinction between their outlooks. In Scotland there is a Christian view of sovereignty, but it is not fundamentally distinctive from other common strands of constitutional thought, because the history of the Church and political thought have been so closely connected. Graham Blount, the Parliamentary Officer, pointed out a parallel between, on the one hand, the polity of the Church of Scotland and the tradition of popular sovereignty and, on the other, the form of governance of the Church of England and the political philosophy of the Divine Right of Kings.<sup>22</sup> Such a parallel implies that there are connections to be found among the culture of a nation, its politics and its religious traditions.

Most interviewees picked up the general question about a Christian view of sovereignty as if they had been asked a much more specific question about sovereignty within the Church, and as if the question had been about the distinction between civil and ecclesiastical jurisdictions. This was an intriguing misunderstanding of the question, which was asked in order to explore whether there was current a theory that God is ultimately sovereign over every kind of worldly authority.

Unsurprisingly, then, there appeared to be a strong affirmation of the existence of a Reformed type of Two-Kingdoms theory within the Church of Scotland,<sup>23</sup> while similar ideas appeared in the Roman Catholic understanding of the

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<sup>21</sup> B. Cameron track 3, A. McDonald track 3

<sup>22</sup> G. Blount track 3

<sup>23</sup> e.g. F. Macdonald track 2

Church's freedom.<sup>24</sup> It will emerge later in this chapter that the key issue was the content of each kingdom on this model and the balance of power between them. At this earlier stage the important question was the continuing existence in modern ecclesiological thought of two realms of authority with some kind of relevant difference between them. Without it, there would be little foundation for any separate spiritual jurisdiction in law.

Bruce Cameron, the Primus of the Episcopal Church,<sup>25</sup> who subscribed to the theory that there was no particularly Christian doctrine of sovereignty, asserted that the Two Kingdoms theory was most useful for constitutional purposes but should not be resorted to as an artificial means of keeping the Kingdom of the God separate from the affairs of this world. This seemed the clearest expression amongst all the interviews of the creative tension that is produced by the existence of both the separation of Church and state (Article IV) and their relationship (Article VI). The exercise overall became one of pursuing each of these principles as clearly as possible without either of them damaging the other; this was the conundrum of the nineteenth century, and there is no sign that it has disappeared at the beginning of the twenty-first.

*Does there seem to be a Christian understanding of sovereignty at work within the rules and practices of the Churches themselves?* For the Church of Scotland as a sovereign body this is a question about how comfortably the concept of popular sovereignty would translate into the internal processes of Church law.<sup>26</sup> Decision-making in the Church of Scotland is not by a process of representative democracy; so there is danger of a contradiction between what the Church teaches and how it orders itself. Whereas the apparently untrammelled sovereignty of the Westminster Parliament has the occasional check of a general election, the superior decision-making bodies of the Church are not chosen by direct election, and the path from the will of God to the Church's General Assembly runs not through the whole people but only through its spiritual leadership. Since the Church differs in such important ways from the civil authority, it is awkward to find exact parallels between the civil and ecclesiastical systems of government in order to compare them.

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<sup>24</sup> M. Conti

<sup>25</sup> B. Cameron track 4

<sup>26</sup> G. Blount track 13

The most radical of the voices expressed dismay at the institutionalisation of the Church and what they believed was a loss of belief in the sovereign freedom of God. Richard Holloway, the outspoken and controversial former Primus of the Scottish Episcopal Church, used Weberian terms, bemoaning the routinisation of the Church's charisma,<sup>27</sup> and he regarded the formal institutional elements of the Church's life as a mere delivery vehicle from which he wished to see the Church, like a satellite, escape as soon as possible. He spoke in Christ-centred terms, saying it was ironic that Jesus who refused to protect himself has given his name to institutions that are strikingly self-protecting, or that 'the great outsider' is served by institutions 'protecting their own ass'.<sup>28</sup>

Bishop Conti explored the distinction between the institutional and the human by referring to the distinction – made by canon lawyers of his tradition and already explored in Chapter One – between the conception of the Church as a *societas perfecta* and as *communio*. His understanding was that the *societas* model was the lawyers' construction of the legal personality of the Church, whereas the idea of *communio* was more of a theological ideal of the People of God. Though there was no intention to mirror the problem Dr Holloway had been addressing, this Catholic analysis turned out to be expressing a similar discontinuity between the content of the Church's doctrine and its regulation by the Church's law. A theological exercise in ecclesiology produces quite different conclusions, language and models of the Church from a lawyer's exercise in analysing the sort of entity the Church is in law. The body people think they belong to is not quite the same thing for legal purposes as it is for inspirational ones, whether the body is the nation or the Church. In this thesis, the intention is to bring both a legal and ecclesiological perspective together to give a single view of the Church that is fair to both purposes.

The clearest example of that problem of inconsistency is one previously discussed: in what ways the Church of Scotland is for legal purposes a corporate entity. There seems to be little difficulty in locating the legal personality of the Roman Catholic Church in Scotland (where it lies in the diocese or with the Bishop),<sup>29</sup> and likewise in the Scottish Episcopal Church (where there is the added

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<sup>27</sup> R. Holloway track 3

<sup>28</sup> R. Holloway track 6

<sup>29</sup> M. Conti

dimension of legal personality at Provincial level, within the College of Bishops).<sup>30</sup> It is difficult, though, to identify an organ of expression for the whole Church of Scotland;<sup>31</sup> the reasons for this have been rehearsed already, and it is difficult to imagine how a single voice can speak for such a theologically and constitutionally diverse denomination.<sup>32</sup> One is left with the distinct impression that the Church of Scotland is not constitutionally well equipped to articulate the peculiar policies and principles of the spiritual kingdom within the structures of the secular order. Yet there is no such difficulty if the focus shifts from a legal to a theological entity: the Church of Scotland's ecclesiology and worship have no difficulty confessing and articulating the idea of One Church. The theological ideal is not matched by the legal and practical experience; and the future of the Church-state settlement in Scotland is vulnerable because of the weakness of the concept of the Church of Scotland as a single, continuous, theologically integrated and legally sovereign body.

The sovereignty of God informs Christian views of politics and law, but it should not be confused with the sovereignty of the Church. The former is the fundamental premise of Church polity, but the latter is just one (highly imperfect) way of understanding the Church as a human institution.

## 2. THE INDEPENDENCE OF CHURCH AND STATE

*Do you agree with Christopher Johnston (later Lord Sands) who famously distinguished the two senses of the word 'grant' (see Chapter Three above)? Do you believe that the 1921 settlement was designed to be the recognition by the Westminster Parliament that the independent spiritual jurisdiction of the Church of Scotland was an inherent characteristic or property, and not one in the gift of the civil order to give or take back?* There was universal approval of Johnston's analysis in the conversations.<sup>33</sup> Kenyon Wright observed that it would have provided a helpful precedent, if they had known about it, for those in the Constitutional Convention who hoped to find a way to entrench the Act establishing the new

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<sup>30</sup> B. Cameron track 11

<sup>31</sup> N. Hogg track 6

<sup>32</sup> J. Mackay track 10

<sup>33</sup> In particular, see N. MacCormick track 4, A. McDonald track 8, J. Mackay track 4

Parliament permanently.<sup>34</sup> However, it is unlikely that the Church's history could in fact have provided the Constitutional Convention with a device of entrenchment; the 1921 Act declared that there was an area of authority beyond the competence of Parliament, whereas devolution was clearly and competently granted by the UK Parliament and could, in theory, be reversed by it. As Canon Wright quoted the right-wing politician Enoch Powell as saying, 'power devolved is power retained'; meaning that every devolution of power from a sovereign body to an inferior one is legally reversible.<sup>35</sup> There was a useful parallel nonetheless, in that the devolution settlement is very unlikely to be reversed, because of its present popularity; and many conversation partners suggested that the long-term safety of the 1921 settlement rests likewise on the unwillingness of politicians to appear to act aggressively towards such a respectable and ancient Scottish institution as the national Church. The Church's settlement is probably protected more by political sensitivity than by any legal ring fencing. The same, according to Canon Wright's argument, is true of the new Parliament: the consent of the people is so strong for its institution that it is effectively secure against the removal of its devolved powers, without any legal contortions to achieve such security.

Given that the interviewees agreed that the 1921 settlement declared the Church's jurisdiction to be outside the scope of the Crown in parliament, several of them quoted the legal maxim *nemo dat quod non habet*, 'no-one can grant what he does not possess', as the controlling principle following on from the distinction made by Christopher Johnston (Lord Sands). Sir Neil MacCormick is a professor of jurisprudence at the University of Edinburgh as well as a Member of the European Parliament and he applied the maxim not just to the 1921 Act, but also to the fact that power over the Scottish Church was clearly excluded from the 1707 Treaty. He believed it was a power the Westminster Parliament should never have exercised (before or after 1921) even if the Scottish Parliament had exercised it – from time to time – before the Union of Parliaments.<sup>36</sup> The 1921-based argument is more attractive because it is built on the notion that these affairs are inherently none of the business of the civil order. The 1707-based argument is founded on the claim that

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<sup>34</sup> K. Wright track 5

<sup>35</sup> K. Wright track 4

<sup>36</sup> N. MacCormick track 5, J. Wallace track 8



they belong to a civil order that happened no longer to exist, which is a theologically unsatisfactory basis, and rather a risky one since the recent resuscitation of a Scottish Parliament. Parliament is not simply choosing to refrain from exercising supremacy over the Church's spiritual affairs, but rather it has admitted that it enjoys no such supremacy, actual or potential, and recognised two separate jurisdictions.

The heart of the question about the independent spiritual jurisdiction is whether the civil order has any supremacy to reclaim over the Church of Scotland, and the consistent answer among current protagonists in the legal and political fields was that it did not. The former Lord Chancellor, Lord Mackay of Clashfern, asserted the converse of that limitation, which is that a body that does possess sovereignty normally does not and cannot give it away. He pointed, for example, to European law, noting that it does not constitute an alienation of sovereignty by the UK Parliament.<sup>37</sup> This matters to the question in hand, since it ought to imply that only the conduct of the Westminster legislature matters in determining the constitutional future of the Church, and that the Church-state relationship could never be remitted to any other power for political determination.

The problem, in practice, is that the threat to the 1921 settlement comes not from a head-on challenge to it, but from the kinds of little, individual threats coming from various directions and narrated in Chapter Four, that undermine the Church's jurisdiction without explicitly opposing it.

*Is it likely that there is any political desire to damage the settlement, and has it already been eroded or compromised beyond rescue? Are politicians likely to welcome the unravelling of the Church's jurisdiction without their having to take the unpopular step of attacking it?*

The belief that there is political reluctance to interfere in the Church's position in law led internal Church voices to suggest that it would take a significant constitutional event to trigger any systematic examination of the merits of the 1921 Act. Lord Hogg of Cumbernauld, a former Lord High Commissioner, suggested

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<sup>37</sup> J. Mackay track 2. Neil MacCormick track 12 approached this differently, rehearsing his suspicion that European law may be a 'post-sovereign' confusion where old measures of supremacy are no longer used and there is a complexity of different authorities working together in the field. This does not appear to damage the main point here: on either version of the argument (whether the Westminster Parliament has sovereignty in this area), the point is that there is no other civil authority with power to determine the Church's constitutional future.

House of Lords reform as the sort of process that might have such an effect.<sup>38</sup> The Principal Clerk, Finlay Macdonald, believed that a full review of the settlement would be preferable to the likely alternative, a process of gradual withering of the Act by a sequence of judgements that limited its effect or qualified its extent.<sup>39</sup> The Procurator, Patrick Hodge, saw the latter outcome as the more likely,<sup>40</sup> referring to the doctrine that later law repeals by implication earlier law with which it conflicts. Sir Neil MacCormick saw this gradual change as a pity, as it was not a process that clearly consulted the will of the people, who, he believed, would not want to see such erosion.<sup>41</sup> He offered the more positive analysis that the 1921 Act was not in a state of collapse, but now exists in a legal framework that contains new elements of domestic and international law, most prominently the law on human rights. The Procurator extended the political reluctance for change to the judiciary, observing the nervousness of courts in recent years to do anything that might be interpreted as interference with the Articles Declaratory, and their contentment to leave reasonable independence in the four traditional areas of worship, government, doctrine and discipline.<sup>42</sup> These were all voices of people who assumed that retaining the current legal status of the Church of Scotland was desirable.

Two, more critical, voices attributed the lack of interference from the civil magistrate to a widespread and proper lack of concern about the institutional Church. Steve Bruce, Professor of Sociology at Aberdeen University, believed there was little importance in taking steps to preserve the institution as an Established Church, and it was more important to sharpen the sectarian focus of the Church's message. He believed it was foolish to spend time re-writing a law that does not change people's behaviour. Richard Holloway, on the other hand, supported an explicit removal of any legal privilege as a cure for the Church's unhealthy institutional life (described earlier in terms of Church's internal rules).<sup>43</sup>

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<sup>38</sup> G. Blount track 7, N. Hogg track 5

<sup>39</sup> F. Macdonald track 9

<sup>40</sup> P. Hodge track 10

<sup>41</sup> N. MacCormick track 13. However Graham Blount track 13 believed there would be 'no uproar' if the 1921 Act were repealed.

<sup>42</sup> P. Hodge track 6

<sup>43</sup> S. Bruce track 9, R. Holloway track 11

It would be a mistake to assume that erosion, or even an outright repeal, of the Church of Scotland Act 1921 would necessarily be a disaster for the Church. Legal processes that modify the meaning of the Act may in fact be a positive, useful service re-shaping the settlement for the future. An open mind needs to be kept on the desirability of all these possible outcomes.

*What is the content of the civil and ecclesiastical jurisdictions; what claims can each rightly make; and where does the dividing line between them lie?* Jim Wallace, the Justice Minister of the Scottish Executive, acknowledged that the difficulty was in finding where the boundary lay between the two jurisdictions,<sup>44</sup> and two contributors provided dramatically contrasting answers to the question about locating the dividing-line. In Chapter Four the comment was made that locating the line was a difficult task for the civil courts, but in these conversations the point was pressed about where the Church should wish to see the line drawn. Alan McDonald, Convener of the General Assembly's Church and Nation Committee, had expressed concern lest the Church claim any privilege or immunity it did not strictly need, and argued that it should pursue the most modest definition of what ought to be on the spiritual side of the distinction and maintain that clearly.<sup>45</sup> Kenyon Wright, formerly of the Constitutional Convention, believed that the Christian duty was to render to Caesar only that which was strictly Caesar's, and no more, and concluded that the Church should use the most generous definition of its spiritual jurisdiction, the obverse of Mr McDonald's conclusion.<sup>46</sup> Lord Mackay, with these two approaches put before him, believed that neither of them was a correct legal approach, and echoed instead the approach of Lord Pitman in the *Ballantyne* case discussed in the previous chapter: each case must be individually examined and the wording of the Act applied to it as far as possible.<sup>47</sup> His approach seemed to be that the law would answer most of the questions without the Church having to make a prior decision to take a maximising or minimising attitude to the ecclesiastical jurisdiction. This identifies a difficulty with the metaphor of Two Kingdoms, or a model of sovereignty as a system of self-contained, separate realms of authority: such a model

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<sup>44</sup> J. Wallace track 9

<sup>45</sup> A. McDonald track 10

<sup>46</sup> K. Wright track 12

<sup>47</sup> J. Mackay track 5

assumes that it is always possible to know what is the content of each of the realms. But as Lord Mackay says, it is only on a case-by-case basis that one can determine whether a subject, a situation or a judgement lies within the legitimate areas of Church worship, government, doctrine and discipline and so beyond the reach of the civil law. If in particularly hard, marginal cases the law cannot determine in advance which jurisdiction is the right one, it is impossible – and always has been – to articulate the whole content of each Kingdom’s law. The image of keeping spheres of sovereignty separate assumes that the spheres are already defined, but the occasions on which Church and state might conflict are much less predictable and stable than that imagery suggests.

A most helpful change of image was provided by the Principal Clerk, Finlay Macdonald, who used a metaphor of concentricity, imaging the jurisdiction of the Church to lie inside the jurisdiction of the civil order. His motivation was acknowledgement of the relationship between the two orders, or (as he put it) to ‘avoid denying the Incarnation in the world’.<sup>48</sup> This is a highly original way of recognising the separation of jurisdictions, different from the sphere-sovereignty model that best describes the history of Church-state relations in Scotland. Sphere sovereignty assumes there is no overlap between the two authorities; that they cannot occupy the same space, because the Church exercises authority over matters that should not concern the state. It sees the horizontal extent of the spheres of sovereignty like billiard-balls that cannot overlap. Dr Macdonald’s visualisation regards the Church’s authority as independent of but inside the scope of the civil law, indicating that the area of its authority includes some subjects that might fall to the state in the absence of Church law – in other words, it is not an irrelevant jurisdiction covering only matters of no interest to the secular magistrate. The principle behind the 1921 settlement is the former of these two, the assumption that the areas left to the Church’s own jurisdiction are inherently foreign to the interest of the civil law. The Clerk’s conception is a much more honest acceptance of the contemporary reality, that there are unresolved disagreements about the content of the two and their mutual boundaries.

The image can be developed further than the Clerk has done, to provide a way of thinking about the 1921 settlement in an entirely flexible way. The fact that

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<sup>48</sup> F. Macdonald track 12

Dr Macdonald assumed that the circles would be ‘concentric’ testified to his Christian starting-point that sees God as the ultimate sovereign in both kingdoms; but a more neutral recognition of the Church’s properly independent authority could imagine the Church occupying space within the general regulation of the whole community, but lying off-centre or – better still – hanging over the edge of the civil jurisdiction, to reflect the truth that there are things the civil jurisdiction clearly does not care about (e.g. elements of worship) and issues of potential conflict that attract the interest of both authorities (e.g. discriminatory practice in the employment of ministers). Furthermore, Dr Macdonald’s mental picture of one circle inside another circle was perhaps not messy enough for the need that is being addressed here. If Lord Mackay is right about the case-by-case process of locating the spiritual jurisdiction, the shape and extent of bits of that jurisdiction will change, grow and shrink. Whenever a court of the Church does something new, or builds on precedent, or resists the jurisdiction of the civil courts, and whenever the civil courts insist that they are competent to judge a cause, or Parliament legislates in a manner that affects the Church’s interests, the Church’s remaining jurisdiction will have increasingly untidy contours. Whether the Church’s legal life is inside the nation’s or straddling its edge, and whether it is a neat circle or a messy blob, the kingdoms seem to have points of contact, overlap and tension that, to date, survive.

The relevance of the legal authority of any institution (the issue of *competenz-competenz*) matters most when there is a dispute that needs to be resolved. For the present purposes that may happen in one of two ways, and each of them is important for determining what the extent of the Church’s authority should be. One is where the disagreement lies between the Church’s view of a matter and the opinion of the civil law (the example of abortion exemplifies this): the other is where the disagreement is internal to the Church (the sexuality debate is the clearest current example). Using language adopted earlier in this thesis, it is the difference between a question relating to the horizontal sovereignty of the Church against the claims of external authority, and a question of the internal, vertical sovereignty of the Church ruling over those subject to its authority.

*What is the duty of Church law when the relationship becomes messy? Is it a legitimate exercise of the Church’s inherent authority to choose to differ with established secular opinion?* Most of the interviewees believed that the Church’s teaching took a higher moral stance than the philosophy behind a liberal secular law,



and they believed the Church should refuse to compromise, especially on matters of personal ethics, where it believed it should impose a higher standard and a stricter discipline. An unusual denial of this presumption came from Dr Holloway, whose unconventional opinions extend to questions about sexual ethics.<sup>49</sup> His contention was that the Church's conduct in the field of human rights displays a lower moral standard than the rest of society, and it did not earn the right to a privileged legal position, a position he maintained it abused. Graham Blount, the Scottish Churches' Parliamentary Officer, agreed that the Church's position did not exist to excuse it from reaching the standards of the civil law nor allow it to 'hide behind its independence',<sup>50</sup> and Alan McDonald from the Church and Nation Committee believed this was a problem that could strike at the good reputation of the Church.<sup>51</sup>

When the Church comes to deciding where are the points when it has to maintain a distinctive position against the prevailing culture or the current civil law, it has to debate the position it will take and decide what is the highest possible moral stance. When the Church tries to define the philosophy and theology of its exercise of power and authority, it is challenged by these arguments to keep that higher standard as its constant target.

These comments are not peculiarly a challenge for the Church of Scotland, and one of the aspects of this research has been the question of whether the experience of the national Church, with its particular legal settlement, is significantly different from the experience of the other Christian denominations in Scotland.

### 3. CONSTRAINTS ON THE CHURCHES' SOVEREIGNTY

#### The Position of Other Churches

*What practical difference is there in law between the Church of Scotland and the other Churches in Scotland?* As explained in the previous Chapter, other denominations and faith-groups in Scotland are regarded as voluntary organisations

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<sup>49</sup> R. Holloway track 5

<sup>50</sup> G. Blount tracks 8 and 10

<sup>51</sup> A. McDonald track 9



by the civil law<sup>52</sup> and, on the authority of the case of *McDonald v Burns*,<sup>53</sup> effectively enjoy judicial immunity if acting clearly within their constitutions. As the Procurator pointed out, theirs is a contractual model, with the courts intervening only if a Church was deemed to be in breach of the supposed contract between the denomination and its member.<sup>54</sup> The experience of Church leaders from denominations other than the Church of Scotland appeared at first to bear out the suspicion that the 1921 Act had delivered an independence from the civil law that already existed for the non-Established Churches, almost as if the Act were removing the disadvantages of Establishment rather than conferring an advantageous status on the national Church. Episcopalians, for example, did not have a sense of disadvantage alongside the Church of Scotland: both the Primus and Canon Wright could see no lack of manoeuvrability in their system and no lack of necessary freedom.<sup>55</sup> The Principal Clerk believed they were unlikely to be treated differently from the Church of Scotland in practice, though he did not say whether this was a legal analysis or an expectation that the hesitation of the civil magistrate to interfere in religious affairs would extend beyond the national Church.<sup>56</sup> Graham Blount at the Parliamentary Office ascribed this religious freedom in part to political apathy about religion in general. He further maintained that the freedoms enshrined in the 1921 Act were won for the whole Church in Scotland, not just the Church of Scotland, and implied that the ecumenical tenor of the Act indicated that its ethos and intention should extend its effect throughout the Christian community.<sup>57</sup> Jim Wallace, the Justice Minister, when pressed on this question, suggested that the Church of Scotland would be ‘two steps ahead’ of other Churches in defending its spiritual realm against challenge in the courts or in Parliament, but he could not give an example to illustrate that.<sup>58</sup>

***Have the legal differences between the Church of Scotland and the other Churches been reduced to nothing?*** According to Lord Mackay of Clashfern, the

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<sup>52</sup> See F. Lyall, *Of Presbyters and Kings*, chapter VI

<sup>53</sup> 1940 SC 376

<sup>54</sup> P. Hodge track 6

<sup>55</sup> B. Cameron track 6, K. Wright track 7

<sup>56</sup> F. Macdonald track 5

<sup>57</sup> G. Blount track 7

<sup>58</sup> J. Wallace track 8

former Lord Chancellor, most certainly not.<sup>59</sup> He pointed out the significant difference that would come to light if an internal dispute arose which was referred to the civil law. In terms of the 1921 Act, the Church of Scotland has the power to make determination of its doctrines and purposes from time to time; in other words it has the power of a developing self-determination within its constitution. So if it properly decides to make a conscious shift in its doctrinal position (as the General Assembly did in Act V 1986, when it dissociated itself from parts of the Westminster Confession of Faith) it did not lose essential continuity with its own constitution, and so did not risk civil action by a dissenting minority. Other Churches have only the precedent set by the *Overtoun* case (the ‘Free Church case’), which was decided on the basis of civil trust law: the effect is that where there is an internal dispute with a patrimonial claim or interest, the courts must determine whether either party has strayed beyond the purposes of the foundational documents or events that determine in law what may be said to be the purpose of the organisation, and award the property of the organisation to the side that has remained within the purpose that has been so determined by the court. Most religious organisations do not have anywhere in their constitutional documents the power to change, because most religious organisations at the time of their first institution have what James Mackay called a ‘high view of a single revelation’ and that makes doctrinal change anathema. So while he agreed with the proposition that a wily group could so constitute themselves in law as to provide such power of change within their trust-purposes (thus arranging for themselves substantially the benefits of the 1921 Act), he maintained it would be a most unlikely event; and he observed, more as a matter of Christian faith than of legal opinion, that such a high view of a single revelation is a more desirable position for a Church. He went on to point out one implication of this situation, which is that it is for the Church of Scotland under the 1921 settlement to make judgement as to who can be said to lie within its community of faith, or who can be said to be fulfilling its purposes; and the national Church differs from the others in this respect.

This was a surprising revelation, because it pointed to such a large difference between the national Church and other denominations in Scotland, a difference that was not mentioned in the sketchy literature in this field. Most of the interviewees had struggled to describe any difference between the two bases of legal identity, but

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<sup>59</sup> J. Mackay tracks 5-6 and see N. MacCormick tracks 7-8

when it was pointed out by James Mackay it clearly put the two situations in very different lights.

If Churches other than the Church of Scotland operate in law without the 1921 settlement to protect them, is there a better basis of protection that all the Churches might use? Is there an alternative legal foundation for the spiritual freedom of the national Church and other denominations alike?

### **The Human Rights Model Alternative**

*Do the Churches in Scotland need to rely on traditional legal protections, like the 1921 settlement, when human rights law provides religious freedoms? Would that be enough of a basis for the religious freedoms of the Churches? Does the Church have collective rights in law?* Professor Bruce quite bluntly predicted that the Church of Scotland's own jurisdiction would one day be lost under human rights law.<sup>60</sup> The idea was therefore sketched to each of the lawyers of an abandonment of the existing settlement in favour of a simple reliance on Article 9 of the European Convention on Human Rights for matters beyond the scope of civil law, along with subjection to civil law for matters that could not be defended by a religious classification. They were asked whether they detected a difficulty with the casting of the European Convention in individualistic terms (see Chapter Four), and whether the corporate needs of the Church as an institution would be adequately met in this way. Graham Blount and Alan McDonald believed that the individual emphasis made it an incomplete and inadequate model.<sup>61</sup> Jim Wallace thought the answer to this question was not clear, and suggested it would be risky to stake religious rights entirely on this model rather than a legislated one.<sup>62</sup> Lord Mackay came to quite the opposite conclusion, though, asserting that the rights to religious freedom must include the individual's rights acting in concert with others, and he concluded that the independent spiritual jurisdiction probably was a reasonable deduction from the meaning of the Convention.<sup>63</sup> However, he conceded that the places where the boundaries between civil and ecclesiastical jurisdictions would fall

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<sup>60</sup> S. Bruce track 5

<sup>61</sup> G. Blount track 10, A. McDonald track 10

<sup>62</sup> J. Wallace track 10

<sup>63</sup> J. Mackay track 8-9

might not turn out the same if determined by a human rights process rather than the 1921 Act; and he suggested that the latter system provided more certainty and exactness. He agreed that the implication of his argument was that human rights provisions provided a great deal of religious freedom for most purposes, but that some of the others interests of the Churches as institutions could only be protected by specific provisions of domestic law. As the Procurator expressed it, human rights legislation is designed to guarantee minimum norms, but goes no further than that minimum.<sup>64</sup>

*Does the Church really behave in a collective manner in exercising any rights it might have? What rights does the Church have when it is opposed, as a body, to a provision of the civil law?* Were the civil law to legalise homosexual marriage, many Churches would refuse to conduct such ceremonies, and must be accorded liberty of their corporate conscience to do so. This principle was asserted by many interviewees, including Dr Holloway.<sup>65</sup> It supports Lord Mackay's point that Churches must be expected to some degree to testify to a revealed truth that transcends even the most self-evident of secular principles. At its sharpest, the problem between Church and state could arise if the position taken by the Church on a contentious issue breached the standards of human rights articulated by the Scottish Parliament. In that case the Parliament and Executive might be forced into conflict with the Church, putting into legal question the Church's right to independence of view.<sup>66</sup> The religious exemption in the Sexual Orientation Regulations, discussed in the previous chapter, has averted such a conflict, and so it was a necessary provision in law although it was theologically and morally very controversial.

*There is the rub: many Churches cannot agree on anything, and are quite incapable of finding a common line to assert, are they not?* There is a massive legal problem within the Church of Scotland,<sup>67</sup> its huge diversity in theology and ethical viewpoints. From completely different starting-points, Lord Mackay and Professor Bruce both effectively suggested that the Church's legal difficulties would be much eased if it held a less tolerant, more sectarian position. The nature of the

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<sup>64</sup> P. Hodge tracks 11-12

<sup>65</sup> R. Holloway track 5

<sup>66</sup> G. Blount track 14

<sup>67</sup> present also in e.g. the Scottish Episcopal Church but not exposed by any recent legal case

problem for this study is that it is extremely unusual to find the Church of Scotland committing itself to any single position without having to respect the liberty of opinion of a substantial minority. It is consequently very difficult to implement in law any decisions of principle and makes the whole jurisprudence of the Church very hard to identify. Lord Mackay thought it was questionable whether the Church ought to aspire to such breadth of beliefs.<sup>68</sup> Professor Bruce's criticisms of the Church of Scotland focussed on its lack of effectiveness through its lack of distinctiveness. He believed that the Church of Scotland's historical determination to have a presence in every parish means that it is weak and unfocussed, because its strength is thinly spread and it does not focus on its most committed supporters.<sup>69</sup> He did not seem to see the Church as problematic or objectionable to those who did not subscribe to its beliefs, but rather as irrelevant, foolishly clinging to a self-image as a significant national institution. He suggested that if the Church were to align itself with secular principles of human rights, it might as well take the nobler step of abandoning what is left of its separate spiritual jurisdiction and opting for a consistent subjection to the legal standards of secular society. He pointed out the weakness of that step, since it would mean the abandonment of any position of principle the Church might want to take in opposition to that civil law, and the Church, after all, is pointless if it is not prepared to be distinctive.<sup>70</sup>

Mr Hodge, the Procurator, expressed this as a difficulty with the inherently pluralist nature of human rights laws. He pointed out that the Church is bound so far as possible to serve the interests of pluralism, not least within its own breadth of opinion; but the General Assembly is likely from time to time to take a stance on certain issues that has to be singular and distinctive, and is not consistent with pluralism as the highest norm.<sup>71</sup> Mr Hodge's argument for single, distinctive standpoints where they are unavoidable is helpful for a Church that promotes a single teaching on moral issues, like the Roman Catholic Church or those denominations who, as Lord Mackay put it, are unlikely to aspire to develop and change their theological positions. There must always be the possibility that the convictions of

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<sup>68</sup> J. Mackay track 10

<sup>69</sup> S. Bruce tracks 5-6

<sup>70</sup> S. Bruce track 14

<sup>71</sup> P. Hodge track 11



religion are so strong that they seem, to the believer, to outweigh the right that someone else is claiming (for instance in the abortion debate), even when that other claimant is another Church member. In the national Church, by contrast, with its evolutionary nature enshrined in the 1921 settlement, diversity of view on things that do not enter into the substance of the faith is sacrosanct. There, individuals must normally be legally protected from their denomination's temptation to require them to adhere to a belief that is against their conscience. In a national Church whose characteristics include its very breadth, the human rights model may have an internal role in guaranteeing freedom of conscience.

*What, then, are the responsibilities of the Church to promote the human rights of other people, both its members and those whose interests it affects?* To the extent that the Church is subject to the civil law, this is straightforward enough, as the duties of the Church are no different from those of any other body except where the civil law gives a particular exemption or relief for a religious purpose. The question was pressed, however, in terms of the Church's own law, and whether the General Assembly should align its own legal system with the European Convention, and none of the interviewees challenged the merit of doing so. Professor MacCormick, from his perspective as a Member of the European Parliament, suggested that the Church should have a European law verification committee that would assess the Church's proposed laws against EU law and maximise their alignment.<sup>72</sup> There are obvious limitations to the possibilities of alignment, if the distinctiveness of the Church's function is preserved. For instance, Professor MacCormick pointed out that human rights conventions normally aim to minimise the needless compelling of any person's behaviour, and he felt that would be a problem for the disciplinary processes of the Church which he assumed do the exact opposite.<sup>73</sup> However, this thesis has previously shown that the way in which the disciplinary processes of the Church work, or too often fail to work, is entirely consistent with a principle of non-compulsion. There are few options available in the case of a minister who commits a disciplinary offence or fails to implement an instruction of the Presbytery or the General Assembly. The censures available to the disciplinary authority fall into two types: one involves permanent or temporary

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<sup>72</sup> N. MacCormick track 11

<sup>73</sup> N. MacCormick track 10



removal from office, which does not compel the desired behaviour but thoroughly prevents it; and the other consists of the imposition of a reprimand, which achieves little if the individual does not have a strong sense of shame and a respect for the authority of the process to begin with. The obvious conclusion seems to be that the Church unwittingly complies with this principle of human rights thinking precisely because as a system of compulsion of behaviour its disciplinary measures are largely ineffectual.

*So would anything be gained if the Church of Scotland were to abandon the independent spiritual jurisdiction; and would the resulting situation be much improved by the recent articulation of principles of human rights – and especially of Article 9 of the European Convention – within Scots law?* These conversations suggest that there is more to be lost than to be gained by replacing the 1921 settlement with a more secular-based provision. Lord Mackay makes a useful point, that the human rights legislation under-girds the more specific provisions of domestic law, and would provide a safety net were the existing settlement to be dismantled to any extent. Other Churches and faith-groups in Scotland may already have to resort to those provisions in the absence of special, constitutional legislation like that benefiting the Church of Scotland. There seems, though, at least an equal merit in approaching the relationship between Church law and human rights the other way round, as the Church of Scotland already does. Within its spiritual jurisdiction, it brings its own theological and procedural scrutiny to the principles articulated in human rights thinking, assesses them against its Christian ethics and confessional standards, and selectively develops its own practice and law with reference first and foremost to those standards of its own. Dr Blount described this as the Church of Scotland going the second mile before it is forced to go the first mile.<sup>74</sup> Though imperfect, this system is at least primarily an ecclesiastical one. It does not expose the Church to a secular system of regulation that may be more constricting than liberating, a system that is not designed to cater for institutions that may insist on marching to the beat of an entirely different drum at entirely unpredictable moments.

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<sup>74</sup> G. Blount track 11

### The Long-stop of Conscience<sup>75</sup>

At the General Assembly of 2001, the question was put to the Procurator whether Church members should take part in protests at the Faslane Nuclear Submarine Base on the Clyde. In his reply, Mr Hodge pointed out that protesters would be charged if they breached the criminal law, and that his responsibility to the General Assembly was to point out the implications of that law. Membership of the national Church conferred no peculiar rights and responsibilities in that sort of situation. In this series of conversations this point was put to most of those who took part: *when all else fails and the conflict between the Church's position and the civil law is irreconcilable, to what extent should individuals resort to breaking the civil or criminal law where it conflicts with their Christian principles?*

Everyone who was asked this understood that there would be circumstances in which conscience would be a higher authority than secular law, but there was variation in the extent to which people thought this could properly be put into action, and the conversations about this hardly scratched the surface of what in itself is a proper subject of study. It was recognised that many Church members and ministers were proud to have been arrested in Faslane in the immediately preceding years, and that in putting themselves in this position they had weighed the Gospel imperatives, as they understood them, against the demands of the civil law, and acted true to the conclusion they reached.<sup>76</sup> This was the most unsophisticated approach.

Both James Harkness, the former Chaplain-General, and Jim Wallace, the Justice Minister, expressed the more complex view that the individual should do everything possible to avoid illegality, and be careful not to arrive too readily at what might appear to be the last resort, of lawbreaking.<sup>77</sup> The Church has a role, through its Church and Nation committee and in other ways, to influence the process of law-making and public policy; an individual who breaks an objectionable law without having first tried to persuade the legislature to repeal it, is taking a step that is, to that extent, not the final resort.

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<sup>75</sup> This was a phrase used by the author in the course of the interview with Alan McDonald, who found it striking.

<sup>76</sup> B. Cameron track 11

<sup>77</sup> J. Harkness track 10-11, J. Wallace track 10

The most stringent argument was made by Lord Hogg, and echoed to some extent by Bishop Cameron and Canon Wright.<sup>78</sup> They granted that one of the Church's greatest political responsibilities is to speak out against political regimes that are illegitimate when measured against the standards of freedom and democracy espoused by those Churches, even to the extent of martyrdom: Bruce Cameron gave the example of Zimbabwe at the time of the conversation. Canon Wright expressed this responsibility as the duty of the Church to uphold the fundamental principle of the sovereignty of the people under God.<sup>79</sup> Against this background, Lord Hogg's point was that a legitimate government is elected on the basis of a complex manifesto, and its election gives that manifesto a political status. An objector breaking the criminal law to object to the policy of a legitimately appointed government is, he suggested, acting inappropriately in a democratic country.

The individual in such a situation must decide what is his or her moral duty, and come to different conclusions depending on which of the above approaches seems the right one. Enjoying liberty of conscience in matters that do not enter the substance of the faith, a member of the Church of Scotland has the right to make those judgements and act upon them; though the General Assembly may criticise the principle being acted upon. That becomes impossibly difficult, once again, when the legal person making such judgements and adopting such courses of action is a court or agency of the Church, which is notoriously incapable of coming to a single mind on almost anything and cannot bind the consciences of members who take a minority view.

The lesson from this exploration is that any Church would need to be very cautious in legislating in ways that make it impossible for its members to obey both their Church and the civil law. Before taking such a step, the ecclesiastical authority would have to take a view on Dr Harkness' and Lord Hogg's arguments above and decide to what extent the Church had a duty to support the civil law as it stood and work with rather than against the democratic process of civil governance.

There are only occasional circumstances in which this opposition of mandates presents a problem. If the Church had no special protection for theological opinion, then every principled stance by members of the Church would be vulnerable to the

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<sup>78</sup> N. Hogg track 9, B. Cameron track 11

<sup>79</sup> K. Wright track 3

censure of the civil law and so any distinctive position taken by the Church would be politically problematic. The point is to determine what, if any, should be the extent of freedom of religious conscience; and at the moment, in theory, that is confined for the Church of Scotland to the matters the civil law believes are purely 'spiritual' in terms of worship, government, doctrine and discipline.

## 4. THE RELATIONSHIP OF CHURCH AND STATE

### The Sixth Article Declaratory

At this point in each conversation the focus shifted away from the separation of Church and state and towards their proper relationship, away from the provisions of the Fourth Article Declaratory and towards the provisions of the Sixth, which may be found set out in the Conclusion to this thesis.

*Does the language and concept of Covenant help in describing the relationship between Church and state espoused in the sixth Article Declaratory?*

Earlier in this thesis, an important distinction was made between relationships based on the religious idea of Covenant, and relationships based on the legal process of contract. A contract is a bilateral process of mutual binding, often negotiated and therefore based to some extent on compromise. It is therefore not a suitable instrument for a relationship between Church and state, to which the Church brings non-negotiable beliefs and principles and must refuse to compromise on those things on which it takes a fundamentally distinctive position. The Christian concept of Covenant, by contrast, is of a relationship created by God, in which the obligation and accountability of each party is to God; and Lord Mackay observed that in Scripture there is never any negotiating of the Covenant relationship between God and His people, but it is rather declared by God.<sup>80</sup> The Principal Clerk used the example of marriage, in which each party makes a unilateral and unconditional promise and commitment, unlike a contract in which the commitment of each is contingent on the negotiated commitment of the other.<sup>81</sup> He extended this to the ideal relationship between Church and state, but conceded that in today's conditions

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<sup>80</sup> J. Mackay tracks 3-4

<sup>81</sup> F. Macdonald tracks 5-6

it might not be possible to expect such an understanding from the state, and so the language of contract might inevitably be used from the secular point of view. This illustrated a central theme of this thesis, that the attitude of the civil magistrate to its duties and responsibilities is no longer cast in the language of Christian spirituality. On the other hand, Graham Blount, the Scottish Churches Parliamentary Officer, felt that the language of Covenant was still useful to express the relationship between the people of Scotland and their new Parliament because it alluded to something deeper than a contract, though he accepted ‘covenant’ would mean little to those who did not mean anything religious by it.<sup>82</sup>

A Covenant relationship is not mutually constraining in the way a contract could be, and so it liberates each party to be true to its own principles within their wider relationship and mutual responsibilities. In particular, it frees the Church to proclaim the Kingdom of God without compromise,<sup>83</sup> and to make that its contribution to the national life. Dr Macdonald the Principal Clerk was only anxious that the Church should not ‘sound unctuous and patronising’ in the attempt.<sup>84</sup>

A natural objection to such encouragement is that the general population no longer believes Christian teaching, and does not share the Declaratory Articles’ view of the nation’s corporate, national duty. That growing secularism is part of the contemporary reality that bolsters the conclusions of this thesis, and suggests that the language of the Articles needs to be challenged. Once again, Professor Bruce provided a curious form of re-assurance from his peculiar perspective. He pointed out that the foundation statements of many institutions are full of what he called ‘risible’ language, articulating the most ambitious aspirations, and soundly ignored by other people. In its own foundation-documents, the Church of Scotland is, he believes ‘lumbered with the recollection of what it used to be’, and so it happens to include risible language about the religious duty of the whole nation; and Professor Bruce is certain that it will be ignored in the usual way of these things, and so he did

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<sup>82</sup> G. Blount track 6

<sup>83</sup> This was firmly emphasised by many conversation partners, including Bishop Cameron (track 7), Dr Harkness (track 8) and Mr Hodge (track 7)

<sup>84</sup> F. Macdonald track 6

not feel that its appearance in the appendix to an Act of Parliament mattered in the slightest.<sup>85</sup>

The Church lacks a formal articulation of its current expectations of the civil society in which it is set. Article Six expresses hopes that are obsolete to some and risible to others. There is scope for attempting a contemporary re-fashioning of its principles.

*Is the language of the sixth Article merely descriptive of the goodwill of Church and state in 1921; or is it still prescriptive, articulating the intention of the Church for the life of the nation? When the Article is translated into the contemporary context,<sup>86</sup> a multicultural and multi-faith Scotland,<sup>87</sup> what kind of implications does it have for the expectations the Church can have?* The most common view of those interviewed was that the Church certainly could not expect the legislature corporately to serve only a Christian vision, or to make laws that discriminated in favour of the intentions of the Churches.<sup>88</sup> However, some of the legislature's members might be people of faith and bring that perspective to their decisions; and so the legislature could certainly do things that were in accord with Christian principles. Equally, the Church may lobby government with its own social vision, just as any institution in society might do. The kind of influence the Churches have in many parts of the world is no longer as strong and substantial as it had been between the time of Constantine and the modern era. Bishop Conti warned, however, against imagining that the Church was reverting to its pre-Constantinian, minority voice: he believed it was better to see the Church as moving forward into a new relationship with the civil order, and not just losing its grip on an old kind of authority, whose passing would in any case be welcomed by some and regretted by others.

Many of the interviewees described positively the relationship between the Church and civil society as it has evolved to be, rather than as the legislation might have intended it to be. Jim Wallace pointed out that there were no mechanisms for the fulfilment of Article VI, but he narrated a variety of kinds of connection and

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<sup>85</sup> S. Bruce tracks 8-9

<sup>86</sup> A. McDonald track 4

<sup>87</sup> G. Blount track 5

<sup>88</sup> G. Blount tracks 5-6



communication between the two bodies.<sup>89</sup> These included the Scottish Churches' Parliamentary Office, the work of the Church and Nation Committee, and visits by serving Moderators to European, British and, recently, Scottish parliaments. In informal conversation with Lord Hogg (unrecorded) it was apparent that parliamentarians were happy to help the institutions of the Church with advice, influence and support. There was a general sense, too, that the promotion of each other's welfare was genuinely two-way, and the contribution of the Church to political and public life was appreciated.

### **Establishment and the Privilege of the Church**

*Is the Church of Scotland still an Established Church, and if so to what extent?* The overall conclusions of this thesis relate in part to the question of whether there is a continuing Establishment: its survival would limit and condition any other changes in the Church's legal self-understanding in relation to civic society. Chapter Three narrated the ways in which it was difficult in the nineteenth century to disentangle state support for the Church from interference with its freedoms, and described the loss of Establishment through the processes leading to the Disruption of 1843 and the settlement of 1921. It was important, therefore, to explore whether there was any extent to which contemporary civic support for the Church carries the risk of compromise of the freedom of the Church. Using Bagehot's distinction employed previously, the question was put separately in respect of the 'dignified' and 'efficient' elements of the constitution, in other words, the elements of the Church's relationship with the state that were largely ceremonial, and those that could impinge on its legal position. The latter of these would have the potential to affect the overall conclusions of this research.

Before looking at the answers given to the general question above, two observations will be helpful to bear in mind. One, made by Kenyon Wright,<sup>90</sup> was that the elements of Establishment still tangible today indicate that the part of the British constitution to which the Church formally relates is the crown, not parliament. Throughout what follows, there is an occasional sense that the Church's place in the nation's life is symbolised in ways that most ordinary Church members

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<sup>89</sup> J. Wallace tracks 6-7

<sup>90</sup> K. Wright track 2

would regard as an irrelevance, just as many people see the royal family as irrelevant for any substantial purpose.

A second observation, this time emerging from the conversation with Lord Mackay, was that the process of disestablishment might be described as an exercise in finding language that was broad enough to re-assure the United Free Church, which in the years before the Union of 1929 wanted to be certain that they were not negotiating a return to an Established Church.<sup>91</sup> Attention has earlier been drawn to Christopher Johnston's observation that the process was a translation of the language of 'Established' into the language of 'national' and 'free', and the question has been raised whether the outcome post-1921 can simply be translated back from the newer concepts to the older to see how much of it survived. These conversations have done exactly this, asking whether contemporary reality indicates the persistence of Establishment, but there seems no sense that the result is a sinister one in terms of the Church's spiritual liberty, as will become clear in what follows.

*In 1921, the Church of Scotland intended to overcome the problems relating to the question of Establishment, but a number of small elements of Establishment remained. The visible residual element in legal terms is the Accession Oath, designed at the Union of Parliaments to prevent the re-establishment by the crown of episcopal Church government in Scotland.<sup>92</sup> What would bring about its removal? What could cause a crisis?*

In answer to the first of those questions, Graham Blount, the Parliamentary Officer, believed the Church of Scotland would not be badly damaged if the oath were no longer taken,<sup>93</sup> but that political inertia meant that only a major event in the life of the crown or the Church would trigger the examination of the oath. Canon Wright suggested that a future monarch might overcome some of the awkwardness of the history of the oath by swearing a more inclusive oath, undertaking to uphold 'the values of the kingdom of God, the crown rights of the Redeemer and the sovereignty of the people under God'.<sup>94</sup> Bishop Conti, a leader of a denomination

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<sup>91</sup> J. Mackay track 7

<sup>92</sup> Lord Mackay, track 7, talked about the Accession Oath being a means to prevent the Church of England extending its jurisdiction North over the Border: this is the first occurrence in this research of the jurisdiction of two Churches being kept in a careful 'horizontal' relation with each other.

<sup>93</sup> G. Blount track 4

<sup>94</sup> K. Wright track 2

that might be expected to find this suggestion an improvement, was unsure whether the relativisation of the oath would help much with the difficulties of perception it caused.

The problem seemed to be whether the oath could be removed from the Accession and Coronation procedure, and Lord Hogg's experience in national politics persuaded him that every examination of this area of the Church-state settlement had indicated that it would be an almost impossibly difficult task to disentangle this part of it.<sup>95</sup> The reasons for such complexity are, it may be assumed, the complex of relationships created by the whole legislation constituting the 1707 settlement and the constitutional complications produced for the Church of England by its unstitching. Lord Hogg was concerned lest such a difficult task be done hastily and only in response to a future event, and he believed the process would require time and much forethought. In this last respect, the Justice Minister Mr Wallace agreed with him, though his reasoning related more to the 'feel-good' factor he detected was generated by the annual re-affirmation of the Queen's promise.<sup>96</sup>

The question of what would prompt a crisis was cast in the context of the Scottish Church Initiative for Union negotiations, which were current at the time of the conversations:<sup>97</sup> *if a SCIFU proposal involved a new Church that had recognisably a mixed form of Church government including Episcopalian elements, and if by a majority the Church of Scotland were to enter the new arrangement leaving a Presbyterian minority outside, what would be the position of the Queen, bound as she is by her oath? What would the oath require in that circumstance, and what advice should the crown be given?* Dr Harkness thought it would be unfortunate if that provoked a constitutional crisis for the crown, since the varieties of Presbyterianism around the world are already so diverse.<sup>98</sup> He wondered whether a change approved by the Church would effectively abrogate the oath, and felt that it was not set in concrete in an obstructive way. Professor MacCormick

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<sup>95</sup> N. Hogg tracks 4-6

<sup>96</sup> J. Wallace track 5

<sup>97</sup> Though the initiative was departed from by the General Assembly of 2003, no-one involved in these conversations was expecting any other outcome even eighteen months earlier. This part of the discussion is retained, therefore, because it was a useful hypothetical situation and produced important observations.

<sup>98</sup> J. Harkness track 4

believed the Queen was constitutionally bound to withhold consent from any measure re-instituting episcopacy in the Church of Scotland (e.g. any civil legislation that would have been necessary to constitute the SCIFU Church), and suggested a referendum as the appropriate instrument to cure what amounted to a problem in constitutional law.<sup>99</sup> Lord Mackay was unhappy with such a use of referendum, which he believed should be used more sparingly, but he agreed that a measure would be required – he was referring to an Act of Parliament – to enable the Queen to keep her allegiance with the majority Church.<sup>100</sup>

And that connection between the monarch and the national Church was widely seen as a helpful and significant one. Dr Harkness believed the Queen's practice of worshipping in the Church of Scotland served as a reminder of the important differences between Scotland and England and the sensitivity of the crown towards them.<sup>101</sup> Lord Hogg believed it was a sign that the country had originally been founded on Christian principles, and he gave the impression that he believed such an ethos is still fundamental today.<sup>102</sup> For the Church's part, there seemed little sense that the Church was disadvantaged by the formal relationship. Bishop Conti thought of the Church of Scotland as having the character of an established Church, but without giving the impression that it was hide-bound in any way as a result. And Canon Wright, an Episcopalian and former Methodist, was not aware of any elements of the royal prerogative that compromised the Church of Scotland.<sup>103</sup>

In some respects the relationship of Church and monarch is vulnerable, because a systematic review of the Queen's relationship with the Church of Scotland might bring about the collapse of several elements of British constitutional law. In other respects the relationship is secure, because there is such strong inertia in the system, and so little likelihood of reform taking place.

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<sup>99</sup> N. McCormick track 9

<sup>100</sup> J. Mackay track 8

<sup>101</sup> J. Harkness track 3

<sup>102</sup> N. Hogg track 6

<sup>103</sup> K. Wright track 9

## Establishment and the National Role of the Church of Scotland

*Should the remaining elements of Establishment be regarded as privileges for the Church or aspects of its national role?* The interviewees failed to produce examples of substantial privilege enjoyed by the national Church. The Principal Clerk, for example, was unwilling at the time of his interview to speculate whether the civil courts would willingly co-operate with the Church courts if the latter applied for help in enforcing a decision, for instance to compel an individual to obey a citation. There was no recent authority to determine whether the secular authority would feel any compulsion to assist the spiritual jurisdiction in carrying out its business.<sup>104</sup> He was much more confident, though, that there was a national expectation that the Church should take a leading role in some aspects of national life, and cited the example of the Queen's Golden Jubilee service in Glasgow in May 2002, which was planned and led by the Church of Scotland but as an inter-denominational and inter-faith occasion. He stressed how this kind of effort by the national Church was always greeted with appreciation, not resentment, by other religious bodies.<sup>105</sup>

The contrast of privilege and responsibility was vividly demonstrated by two comments on the subject of military chaplaincy. Professor Bruce regarded the state payment of army chaplains as a form of privileging the Church (in this case not only the Church of Scotland, but that is incidental).<sup>106</sup> However, Dr Harkness, the retired Chaplain-General, was quite clear that the need for chaplaincy was identified by the armed forces, and the Church was fulfilling its responsibility by supplying a demand from the state, not the other way round. He cited the expansion of chaplaincy services in recent years as evidence that it was not a remnant of a privileged ecclesiastical era.<sup>107</sup>

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<sup>104</sup> F. Macdonald tracks 4-5 Following the case of Ian Andrew already discussed, in which a question of compulsion of a witness briefly arose, the Board of Practice and Procedure agreed there was uncertainty as to whether such an expectation of help from the civil magistrate still legitimately existed. The Board has decided it will invite the General Assembly of 2004 to assert that the Presbyterian Commission has the power to order the citation of witnesses, in order to provide some authority should the question arise in practice.

<sup>105</sup> F. Macdonald track 4

<sup>106</sup> S. Bruce track 2

<sup>107</sup> J. Harkness track 1



Three comments from beyond the national Church itself offered gentle warnings to the Church of Scotland about the dangers of its special position and its sense of service of the whole nation. First, Professor Bruce pointed out the danger of concentrating only on the nationwide dimension of Church-state relationships, explaining that for these purposes the state was as much a local entity as a national one. He pointed out that the Establishment of the Church of Scotland after the Reformation was supported by local powers and he believed therefore that it was a mistake to concentrate wholly on the crown, without considering the implications of the Church's position for its local work and witness.<sup>108</sup> Second, and also referring to the local life of the Churches, the Episcopal Primus expressed concern that the Church of Scotland's self-understanding as the national Church tended to encourage it to take a lead in every situation, even where that was not appropriate and not a good use of the available resources of the whole Church. The presumption of an invitation to provide school chaplaincy in many parishes was an example of a burden of needless monopoly.<sup>109</sup> Third, Richard Holloway firmly believed in the importance of an adversarial relationship, when necessary, between the Church and the secular authority, and was concerned that the kinds of relationship described here might prevent that sort of witness.<sup>110</sup>

Much less was spoken about the more ceremonial remnants of the Establishment in Scotland. The only criticisms of the more colourful elements of the relations between crown and Church came from those, like Dr Holloway and Professor Bruce, who took a highly critical view of other aspects of the Church's future development in any case. More generally, opinions ranged from a sense of harmless, meaningless spectacle and colour, to a positive sense of important symbolism.

The presence of the Lord High Commissioner certainly prompted that range of responses. The highest views taken of the substance of the role came from those closest to it. Lord Hogg, a former occupant of the role, believed it helps to remind the Church of its particular role in the nation's life and of its own task in that setting. He had felt he was able as Commissioner to say to the General Assembly things that

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<sup>108</sup> S. Bruce track 3

<sup>109</sup> B. Cameron tracks 5-6

<sup>110</sup> R. Holloway track 4

it might have more difficulty saying to itself, and gave an interesting impression of having a prophetic kind of role speaking into the Church from outside it, which is an unconventional angle on the relation of Church and nation.<sup>111</sup>

The Dean of the Chapel Royal (Dr Harkness) gave assurances that the ecumenical question is one regarded with care and sensitivity by the crown, and, like Lord Hogg, agreed that the extension of the role of Lord High Commissioner to relate to other denominations<sup>112</sup> does not of itself create legal difficulties or compromise the monarch's existing responsibilities.<sup>113</sup>

Similar concerns related to the Chapel Royal in Scotland, the corps of Royal Chaplains who are currently all ministers of the Church of Scotland. Dr Harkness expressed the hope that their role was more than merely decorative, but there is nothing about it that would be caused mischief by a chaplain being appointed from another Church. Already Churches other than the national ones have been represented by preachers at Sandringham and Crathie in the presence of the Royal Family, and the sensitivities surrounding these traditions have been noticed within the royal household.<sup>114</sup>

It was significant to discover a sense that the apparently entirely ceremonial elements of the crown-Church relationship might express something of substance to the Church. Whatever the future development of the quaintest parts of constitutional life, it will be important to ensure the effect is not underestimated, nor profound messages lost.

## Conclusion

The Church of Scotland has a relationship with the British state that is legally described by Westminster legislation but influenced by a Reformed, Scottish

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<sup>111</sup> N. Hogg track 2

<sup>112</sup> The Commissioner visits the General Assembly of the Free Church during his or her week of office, and this does not cause any constitutional or inter-denominational difficulty.

<sup>113</sup> J. Harkness tracks 3-6, N. Hogg track 2-3. The extension of the Commissioner's role to other denominations is entirely a matter of hospitality at the moment, and there is no extension of the listening and reporting role exercised in respect of the Church of Scotland Assembly.

<sup>114</sup> J. Harkness track 2

tradition of popular sovereignty. To develop that relationship would require, on both sides, both legal skill and political sensitivity, taking into account the goodwill and suspicion that each exist towards the institutional Church. To be worthy of the goodwill, the Church must increasingly struggle internally to temper its Presbyterian polity with a more inclusive democracy wherever it can, and otherwise be responsive to the standards of governance and justice that would be expected in any other legal system. The historical narrative earlier in this thesis acknowledges the importance of the Scots idea of popular sovereignty, for example in the influential thinking of Buchanan and Rutherford: this exercise confirms that it is an intellectual tradition that is still acknowledged, and plays a part that cannot be ignored in contemporary Scottish political philosophy.

The Reformed version of the Two Kingdom theory has not lost its relevance, because there remains the sense that a distinctive Christian voice needs to retain the right, and the machinery, to dissent from the decisions of secular politicians and maintain a different standard. The theological identity of the Church cannot be sacrificed to the contingency and convenience of having one single legal system for sacred and secular affairs. The separation of Church and state in this way is vital, but equally important is their relationship, even a relationship that sometimes has to be rather uncomfortable. Cases like *Percy* and *Andrew* (described in Chapter Four) have demonstrated that the delicate balance between the separation of the temporal from the spiritual and the relationship of mutual benefit between society and the Church, is still a creative tension recognised in the law and political life; and these conversations have confirmed that impression.

The separation of Church and state is inevitable if the Church is to have an inherently peculiar jurisdiction for certain purposes, and it would be disastrous to allow that distinction to be gradually lost through erosion by case-law. The many judgements required to allocate legal questions between the two authorities form a constant process, with difficult questions more frequently forced upon the General Assembly than upon the civil courts in recent years. The Church has to be able to produce adequate reasoned justification whenever it wants to claim exemption from civil law, and not abuse whatever margin of jurisdiction belongs to it and not to the civil magistrate. The Church's justifications and decisions rely for their moral and popular legitimacy on the maintenance of ethical standards that are clearly not inferior to expectations of the civil law.

The experience of the leaders of other Churches, as they described it in these interviews, suggests that they have less difficulty with this issue, normally because they each have a more precise and distinctive theological and moral position on most things. The trust-law basis of their constitutions suits their circumstances, and there seems no demand from most of them for their position in law to be changed.

Neither is there any appetite for any of the Churches, even the Church of Scotland, to change the basis of its spiritual freedoms to a reliance entirely on the provisions of human rights conventions. These do provide minimum safety nets for religious people and groups in civil law, and might usefully do so within ecclesiastical laws, but they do not answer every legal need within the Church's life. One human right always forming part of the Church's witness is the resort to conscience in the face of civil law, but this can only be used as a last resort, a term not yet satisfactorily defined within the Christian community. The theological arguments presented in this thesis accord with the political instincts of those protagonists, who in different ways have wrestled with the way the Church transacts its business and deals with people's lives and livelihoods.

The relationship of Church and state should be seen by the Church as a religious covenant with God and not a human contract with society: this model frees the Church to speak out prophetically to the nation or its government. The element of that relationship that still justifies the term 'Establishment' is entirely symbolic because it connects with national life through the monarchy, but that does not mean it is entirely insubstantial, and it should not be further dismantled lightly. Those who have upheld that Establishment, as Lord High Commissioner, or Chaplain General, or as an officer of the civil government, all respect the symbolic meaning it retains and recognise some important reality behind the symbols.

The fourteen conversations on which this chapter has been based have one striking, common theme. However the future relationship between the Church of Scotland and the civil governance develops in the near future, the steps that need to be taken are virtually all for the Church to take. Most of the conversations developed into discussions of the internal politics and standards of the Church, though the questions asked to introduce each theme did not press the interviewees particularly in that direction. The Church, according to some of the interviewees, should more carefully measure its moral standards against those of society, align its laws more explicitly with those of the European institutions, have clearer criteria for its

members' breaking the civil law on matters of conscience, share its national task more generously with other denominations, and so on. The prospect of any of the Churches retaining their historic measure of self-determination and internal regulation depends largely on the way they use or abuse the authority they have. The conduct and outlook of any Church can affect the extent to which society will allow it to march to the beat of a different drum for some purposes.

The remaining task of this thesis is to suggest the direction in which the Church of Scotland should develop its current constitutional reality: that argument will use the conclusions of Chapter One (on sovereignty) and those of this Chapter (on the recognition of the neuralgic points facing the Church's constitutional experts today). The fourteen protagonists in this field demonstrated a belief that there is little hostility towards the general idea of the spiritual freedom of the Church, but they illustrated various ways in which the independent spiritual jurisdiction – the current expression of that spiritual freedom – has lost much of its recognition in contemporary legal culture. Chapter Six describes a model of Church-state relations quite different from the current one that most of the interviewees seemed willing to defend. However, the proposed new model will serve the underlying freedoms, rights and theological principles that were expressed in many of the conversations.

Appendix

RECORDED CONVERSATION – BASIS OF RESEARCH USE

**Researcher:** Rev Marjory A MacLean, 12/7, Iona Street, Leith, Edinburgh EH6 8SF

**Ph.D. working title:** *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

**Conversation partner:**

**Date of conversation:**

**Citation basis:**

☐ a. The conversation may be cited and quoted at any time and to any extent, provided that the views expressed are attributed to the conversation partner as an individual and not to any Church, political party or organisation.

☐ b. The conversation may be cited or quoted at any time and to any extent, provided (1) that the views expressed are attributed to the conversation partner as an individual and not to any Church, political party or organisation and (2) that during the lifetime of the conversation partner permission is obtained for any direct quotation or indirect attribution of comments.

☐ c. The conversation may be cited and quoted at any time and to any extent but only after the death of the conversation partner, and further provided that the views expressed are attributed to the conversation partner as an individual and not to any Church, political party or organisation.

**Basis of sharing recording:**

☐ a. The recording will be lodged at New College, University of Edinburgh and will be immediately available for general use subject to no conditions except the citation basis agreed above.

☐ b. The recording will be lodged at New College, University of Edinburgh and will be available only to serious academic researchers after ... years, but otherwise subject to no conditions except the citation basis agreed above.

☐ c. The recording will be lodged at New College, University of Edinburgh and will be immediately available only to serious academic researchers, but otherwise subject to no conditions except the citation basis agreed above.

☐ d. The recording of the conversation will be destroyed by the researcher when the current Ph.D. research is complete; it will not be made available in any archive or to any third party.

**Copyright:**

The researcher shall have copyright of the content of the conversation, subject to normal academic usage by others. The conversation partner shall not be prevented from sharing the same information or opinions on other occasions.

..... (Date).....

..... (Date).....



## CHAPTER SIX

# THE CHURCH OF SCOTLAND – A SOVEREIGN AUTHORITY?

The Church of Scotland has its own legal system, complete with legislative, executive and judicial functions; a corpus of written law and a tradition of common law; and a legal literature that reflects changes and guides practitioners. Like any legal system it is based on certain premises and principles, and it would be unworkable if it did not have such an intellectual foundation.<sup>1</sup> Every legal system needs to have a sense of the ultimate source of its laws, which may come from a theological belief, or a Marxist philosophy, or a secular theory of justice, or some other perceived origin. Every legal system can be identified with some kind of theory of decision-making, and these may include democracy, oligarchy, meritocracy or absolute monarchy. Every legal system will develop its own culture of expectations, so that its practitioners can anticipate the place, use and relative priority of rights, duties, liberties and so on. Without these elements, usually known as ‘jurisprudence’ in the sense of ‘legal philosophy’, any body of law risks arbitrariness and rootlessness and is unlikely to form a coherent system. This chapter explores the question of what might be said to constitute the jurisprudential theory for the Church of Scotland’s legal system, and what are the jurisprudential arguments that define and affirm its constitutional position in its relations with secular law.

Some legal systems contain an authority that is regarded as a ‘sovereign’: nation states and international empires are normally credited with sovereignty. Some systems of law serve bodies that are never described as sovereign: local authorities, professional bodies and voluntary organisations come into this category. The development of the Church of Scotland through its turbulent history and the peculiar terms of the 1921 Act leave unclear the question of how far the Church should regard

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<sup>1</sup> The relative weight given to different kinds of elements (Natural Law, precedent, Christian doctrine, the classical tradition, and so on) varies from system to system. This is illustrated by the difference in emphasis between the legal tradition of England, based on common law and precedent, and the civilian tradition of the Scots law system, which is more principle-based. See A. MacIntyre, *Whose Justice? Which Rationality?* (Indiana: University of Notre Dame Press, 1988) p. 226ff

itself as a sovereign institution in law; so this chapter will use the discussion of sovereignty in Chapter One to try to suggest some clarification.

To the extent (if any) that the Church of Scotland possesses a degree of legal sovereignty, it is important to ask whether that sovereignty needs to be defended, and it is necessary to know how to base such a defence. To the extent that the Church is not sovereign but has to submit to a greater human authority, it is important to know where the Church's legal authority comes from and on what contingencies it depends. The historical narrative of Chapters Two, Three and Four provide the resources to describe the Church's current relations with other laws and authorities.

The predictive material of Chapter Five will be brought in to the discussion so that it can produce a suggested legal philosophy for the Church of Scotland, one that demonstrates the true location of sovereignty and the function of legal authority in Scotland's national Church. The conclusions of this thesis consist of a network of related arguments – from theology, jurisprudence and political science – that together provide a theoretical discourse around the 1921 settlement. Such a discourse is missing in recent academic research, which has treated the settlement only as a historical event; though incidentally it is much needed by the Church itself, because the implications of the settlement – and its constant slippage - are a contemporary reality in the Church's polity. With an unprecedented frequency the legal officers of the General Assembly are faced with possible challenges to the integrity of the Church's internal regulation. European, British and Scottish legislation and regulation, case-law precedent within and beyond the Church, the recent growth of trade union membership amongst ministers and the increasing recognition within the Church of equality and discrimination issues are all examples of real pressures on Church polity and governance. What this final chapter begins to address from an academic point of view is some discrimination between the responsibilities of government that the Church must not avoid or concede or forget or fail to defend, and the habits of rule that it is right to question and prise away from the Church's courts.

## **1. A DEFINITION OF SOVEREIGNTY**

In Church life, experiences of authority, influence and the power to affect behaviour do not come only through the structures of the Church's law. For

example, in the doxological life of the Church at worship the sovereignty of God over the whole of creation is often articulated and celebrated. In the obedience of Christian service the sovereignty of God over the world is often given as the motivation of faithful people. It is important therefore to avoid conceptually limiting sovereignty to legal sovereignty alone. The possibility may exist that the spiritual freedom of the Church to live under the sovereignty of God is something quite different from a technical, legal demand.

Throughout this thesis, sovereignty has been defined in terms of its horizontal and vertical aspects, and it is time to draw some conclusions about the significance of each of them.

In its horizontal aspect, sovereignty marks a power that is not qualified or constrained by any external power. Much of this thesis has explored the problem that it is difficult to say that the Church of Scotland has this external element of sovereignty in relation to civil power and law. Chapter Four demonstrates that the parts of the Church's life into which the civil law reaches with its own sovereign power are clearly the parts which cannot be described as spiritually independent, and that it is increasingly difficult to be confident that there remain clear limits to that potential encroachment. Keeping the argument wider than questions of formal law, it is possible to make the same point more generally, and say that parts of the Church's life are compromised by a secular counter-culture that has long since lost its loyalty to the spiritual sovereignty the Church claims; and the debate within the Church is over what that secular culture consists of, how far it is counter to the Church's standards, and whether either compromises the other. For example, national events that were once marked invariably by Christian acts of worship, like the deaths of members of the Royal Family, are marked by many people in ways that are significant and meaningful to them, but not explicitly Christian or institutionally organised.<sup>2</sup>

The Church appears to lack an easily demonstrated element of self-contained horizontal sovereignty vis-à-vis other institutions. However, this does not demonstrate a disastrous weakness on the part of the Church but, rather, a conceptual

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<sup>2</sup> These are illustrations of a secularisation-based argument, which could provide an alternative approach to the topic of this thesis. In the Introduction, that approach was distinguished from the approach of this research, which focuses on the legal, rather than the social, changes in the Church.

weakness in choosing a model of exclusive power to discuss the Church's kind of sovereign authority. One of the conclusions of Chapter Five was that a 'sphere sovereignty' model of mutually exclusive dominions of sovereignty is not untidy enough for the analysis of Scottish Church-state relations in the past, nor for predictions for the future. Scottish Reformed political theology has never lost awareness of the belief that God is sovereign over every authority, ecclesiastical and civil alike; so the distinction of Two Kingdoms, one God's and the other the world's, is clearly troublesome. The Divine Sovereignty should not be confined only to the discipline of the Church: the world is God's too. Untidiness – the lack of over-narrow definition – is also necessary because sovereignties are increasingly fragmenting and shifting: the Church continues to divide into more and more self-determining denominations, while the world simultaneously splinters into more and more states and ethnic units and yet organises itself for certain important purposes into defence alliances, trading groups and cultural associations. Even as long ago as the Union of 1707, the product of the treaty was a state that was not entirely unitary, leaving behind in Scotland a distinct establishment of Church, legal system and cultural society.<sup>3</sup> Where a model of neat, articulated spheres of sovereignty does not work, the reality must be some element of engagement, integration or overlap: in the case of a Reformed Church seeking to engage with the world in which it is set, that should be regarded as a blessing and the limitation it places on the Church's sovereign independence may be, after all, a price worth paying. The question of horizontal sovereignty is one of observation: does this institution find itself subject to any external authority that it cannot resist? For the Church of Scotland the answer in law may soon be 'yes', but there is scope in a Reformed theology to make a virtue out of what some would see as a disappointment, by recognising that the relationship between different communities may be more important than their legal separation.

In its vertical aspect sovereignty has two characteristics, identifiable in the survey of Scottish history presented in Chapters Two, Three and Four. First, the sovereign power is supreme within the jurisdiction: it is the ultimate determining authority that outranks all others and has the final say. In a dictatorship, the dictator's will prevails even in face of the will of Parliament or of the people, but in a

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<sup>3</sup> J. Mitchell, 'Scotland in the Union, 1945-1995: the Changing Nature of the Union State' in T.M. Devine and R.J. Finlay, editors, *Scotland in the Twentieth Century* (Edinburgh: University Press, 1996), p 85-86 makes a similar point.

democracy the will of the people prevails either through direct consultation on an issue (a referendum) and/or through a regular electoral process (in a representative democracy). Second, the sovereign power within a piece of territory or a particular community determines its own sphere and the extent of its engagement and authority, Schmitt's *competenz-competenz*. This is an authority over questions of governance, not just authority to do the day-to-day governing. It is the power to confer power, to identify and legitimate government. These two elements are significantly different. An authority that is supreme but for some reason not sovereign (for example if it is the supreme governing force in one territory within a larger empire) may be a moral or legal force, but it lacks the quality of being the ultimate constitutional power because it does not have the ability to change the source or location of governance. When an institution is being examined and the question is being asked whether it *is* sovereign, it is important to ask too whether it *needs* to be sovereign. If the Church of Scotland has the internal mechanisms to regulate its own affairs and make administrative change, does it need a state-like power to make changes of governance, to alter its own constitution or to define afresh the scope of its authority and influence over its members? If the Church has powers that are sufficient for its purposes but not sovereign in terms of this definition, there may be no need for regret. Another question of vertical sovereignty is one about the merits and values of the way in which power is exercised. How does Church membership compel or influence behaviour? Reformed theology offers a pattern in which compulsion or influence has no legitimate place within the sphere of authority, but a lack of vertical sovereignty for this kind of reason hardly seems problematic for a movement founded on the mandate of the Gospel.

Turning from the question of what defines sovereignty to the question of what its source is, the thesis so far has presented the characteristically Scottish Reformed approach developed through the thinking of John Knox, George Buchanan, Samuel Rutherford and the framers of the National Covenant of 1638. There are several elements in this Scottish tradition. First, at its root is a belief in popular sovereignty, by which is normally understood the self-determination of the whole people in the context of their relationship (individual and corporate) with God. In the immediate post-Reformation literature it is difficult to find a clear description of how an articulate and identifiable process of self-determination works, though Chapter Two narrated the way in which the process of bonding or banding brought



together people of like minds into groups strong enough to effect political or constitutional change. The Reformers were clearer about the nature of the relationship with God, which was a covenant relationship, on which more will be said in the next section of this chapter. The second element in the Scottish model is ‘fiduciary dominion’, the ruler’s power (*dominium*) to govern given by the people, who offer their trust (*fides*) but not their sovereignty, which according to the theory remains with them. The ruling power is therefore supreme but constitutionally bound, and cannot arbitrarily change the bounds of its authority or the constraints under which it is obliged to operate. The third element of the Scottish model is the presence of such constraints on the sovereign people and the holder of fiduciary dominion alike: these have normally been Natural Law and Divine Law, as understood from time to time, and the rule of law.

Since 1707 Scots lawyers have accepted that the English tradition of locating sovereignty in the Crown in Parliament must have an impact on laws made in the British Parliament and applied in Scotland. Since 1999, when the devolution settlement retained Church-state questions at the Westminster Parliament (as a constitutional and therefore a reserved matter), the Church of Scotland has to recognise that any elements of the Scottish Reformed vision of sovereignty have to engage with a British civil order that is rather differently founded and understood. This is why it is important to determine whether the Church of Scotland is still sovereign in any relevant way. This matters not only in order to determine whether the Church has power of self-determination, but it also matters in order to answer the question of whether the Church has the power to choose what sort of human authority it shall be or whether its legal future is ultimately in the hands of the crown in parliament.<sup>4</sup>

## 2. THE CHURCH AND THE SOVEREIGNTY OF GOD

Christianity is a monotheistic religion, and believes in God as creator, lawgiver and ultimate judge. This implies that God is sovereign in authority over all

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<sup>4</sup> This is not a question of the external influence of the Church over social questions, an influence that has declined since the 1920s. It is a technical question about the inherent ability of the Church to continue to regulate spiritual affairs independently, even if that means doing something at odds with the equivalent provision of the civil law.



people and their human institutions, whether or not they recognise him as such. God calls his creation to recognise him and to enjoy a relationship with him; his sovereignty is relational. As noted above, this does not necessarily imply that God's relationship with the world is expressed only through a system of law. In the thought system of Thomas Aquinas, for example, the phrase 'Eternal Law' was used for the overarching divine authority beyond the specific provisions of Natural and Divine Laws: such 'Eternal Law' was not something judicial but rather an expression of God's providence and rule generally. This section offers two characterisations of the divine sovereignty to amplify its brief introduction in Chapter One, but neither is entirely confined to jurisprudential terms.

Chapter One introduced the concept of God's sovereignty being 'diakonal', exercising authority through sacrificial service of the world. Christ who came not to be served but to serve, and the Holy Spirit sent for the comforting of the world, are remarkable because they are divine figures but not figures of control. The redeeming moment, in Christian doctrine, was the moment of supreme self-sacrifice by God in Christ; and the risen Christ gave virtually no programme and no codified system of rules to the apostles. Christian belief expects judgement beyond this life, and unsurprisingly expresses that in forensic metaphor and image, but any element of coerced behaviour or punishment in this life for wrongdoing has been entirely the invention of the institutional Church, especially during the era of what was commonly known as 'Christendom' when Church and state were an alliance of coercive power.

In the last century, as theologians began to argue against the continuing existence or merit of Christendom, descriptions of the Church became common that promoted the idea of its being a non-coercive, powerless body exercising influence but not irresistible force. During the struggles of the German Confessing Church against National Socialism in the early 1930s, the Barmen Declaration asserted the principle of 'not domination but service'<sup>5</sup> as part of the Church's self-understanding. By the end of the century, this view was an unremarkable currency of academic

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<sup>5</sup> *The Ministry of the Whole Church of Jesus Christ and the Problem of Sovereignty: Statement of the Theological Committee of the Evangelical Church of the Union on Barmen IV*, Berlin: Evangelical Church of the Union, 2001, p.37

ecclesiology, a recent Scottish articulation for instance being Ruth Page's *God with Us* discussed in Chapter One.<sup>6</sup>

The non-coercive element of such a description of the Church has huge implications for the contours of the Church's authority. It cannot resist by force – for it says it has none legitimately available to it – the encroachment of conflicting authority from outside, and can assert its own position only by argument. If the Church possesses power or even sovereignty, that power or sovereignty must be fragile, because the Church is not an entity that can go to war against hostile threats and it is not a governmental institution that can appeal to international law against the civil authority. If it finds its horizontal sovereignty has been compromised or lost, there is nothing it can do to compel its recovery, and so its own authority becomes, in effect, contingent on the goodwill and restraints of such surrounding authorities as would possess that authority or jurisdiction in the absence of the Church. The analysis of the civil law treatment of the 1921 settlement, in Chapter Four, demonstrates that this is exactly the situation of the Church of Scotland now.

Neither can the Church compel the behaviour of those subject to its jurisdiction, and its courts have available a much more limited array of censures than the civil law has. It was observed in Chapter Four that there are in essence two kinds of punishment in the current disciplinary code: one is reprimand (which is pointless unless the offender recognises the jurisdiction and feels enough contrition for the words of the court or commission to strike home), and the other is the removal of ordained status (which does not punish the person within the system but removes him or her from it). In other words the vertical, internal aspect of the Church's sovereignty is not constructed to facilitate compulsion of behaviour, and in that respect is true to the Gospel of Jesus.

Diakonal sovereignty requires the Church to be profoundly unlike the other sovereign institutions in the world with which it engages. It also severely limits the leverage the Church has over the behaviour of those subject to its authority. The Church's calling to exercise only God's diakonal sovereignty means it cannot legitimately masquerade as a miniature nation state, even though that was the constitutional model behind the events of 1921.

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<sup>6</sup> R. Page, *God With Us*

The other characteristic of divine sovereignty in the Reformed theological view is that the sovereignty is expressed through a covenant relationship. Chapter Two described the conflict between Church-state relations based on divine covenant and those that appeared to be based on binding bilateral contract. Covenant theology has never regarded the relationship of the human and God as a contractual affair: it is not a bilateral deal but a number of unilateral commitments that constitute a covenant relationship. God, in entering such a relationship with Noah (the promise after the flood) or Abraham (the promise of the land) or any of the other pivotal figures in the Bible's stories, always made a promise first and then called the person or nation to commit freely to the other part of the relationship. In Baptism, the Church believes that the grace conveyed in the sacrament is not conditional on the vows taken (though they are certainly expected to be taken) and the ordering of baptismal liturgy in the Church of Scotland has in recent years reflected such a covenant understanding.

Again, ecclesiology has learned to reflect this idea in its modelling of the Church. A Church based on a civil law contract is not the same as one based entirely on a spiritual covenant. The main point about a contract is that the parties to it are bound by its original terms, and unless there is a universal agreement to vary its conditions it remains binding without alteration. This has implications for the constitutional freedom of a Church, again both in terms of its vertical jurisdiction and in terms of its horizontal relations. If a Church is regarded as constituted by a binding agreement of its founding members – the normal manner in which a voluntary association comes into being – the terms on which it operates and the system of beliefs on which its identity is based cannot be changed without the risk of a high price. The Free Church case that ended in 1904 (described in Chapter Three) determined that the Church founded in 1843 was defined for civil law purposes by its original constitution, so that the pecuniary interest in it belonged to any party that showed that it alone had remained faithful to the original trust purposes as the civil law understood them.

The response to the events of 1904 within the United Free Church, along with the 1921 settlement, provided a different constitutional definition for the Church of Scotland, one using the concept of covenant that enables it to change and develop without those obstructive limitations. The Church's laws, which change from time to time, are genuinely regulative of the internal affairs of the denomination but they are

not bindingly constitutive of the Church's legal identity: they do not leave the Church stuck in a past age and constitutionally unable to keep up with events. Having this power to change has mattered in Scottish Church history. In the late eighteenth and early nineteenth centuries, one of the causes of division within the Secession Churches was what is known as the 'New Licht – Auld Licht' debate over the status of the Westminster Confession of Faith.<sup>7</sup> Underlying the particular debate was an argument between the belief that there could be new revelation from God for the Church and the belief that the light of divine knowledge was given once for all time. It is literally vital for the Church's existence that it should have the power of dynamic self-determination. That may be because the light of revelation to which it aspires does not change, but the Church needs to be able to adjust its standards to ever-improving understandings of the Word of God; or it may be because the Church's vocation does change through time and God does have new demands of it.

The conversation described in Chapter Five between the author and Lord Mackay of Clashfern was absorbing in this respect: Lord Mackay recognised as a lawyer the merit of the Church of Scotland's constitutional scheme and its advantages, but as a conservative evangelical Christian he had difficulty accepting that a Church would want to use that power for any theological purpose. But there is growing theological hostility to the contractual, and rather static, voluntary association model of Church identity. The theologians who wrote the Barmen Declaration in the 1930s, said:

'Just as the church did not come into existence as a result of the voluntary association of its members, nor is the order of the church to be seen exclusively as the contingent outcome of how the church organises itself.'<sup>8</sup>

The theologian Stanley Hauerwas speaks of the Church resisting what he calls a temptation to be a voluntary association, whereas the Church does not associate voluntarily but under the command of God's call.<sup>9</sup> Pieter Coertzen, a

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<sup>7</sup> Brown, *The National Churches of England, Ireland and Scotland* p. 44 – the focus of the debate was whether the Confession's teaching on Church and state could embrace the idea that Church membership should be a voluntary act of an individual and not the automatic effect of being a member of a covenanted nation.

<sup>8</sup> *The Ministry of the Whole Church of Jesus Christ and the Problem of Sovereignty: Statement of the Theological Committee of the Evangelical Church of the Union on Barmen IV*, p. 57

<sup>9</sup> S. Hauerwas, *In Good Company: the Church as Polis* (Indiana: University of Notre Dame Press, 1995) p. 26

contemporary Dutch Reformed writer on Church law and order, points out that a mark of Church law is that the Church should not be in the hands of its members; it is really God's work, only empirically taking the form of the association of believers, and it should give expression to God's will for the Church.<sup>10</sup> Coertzen observes Calvin's teaching that the Church council and its members must not supplant Christ.<sup>11</sup> All these arguments suggest that nothing must humanly obstruct the ability of God to reform the Church, to change or develop it or to enable it to relate in new ways with the world in which it is sent on its mission. The implication is that the Church's jurisprudence and constitutional theory must be based on the premise of spiritual obedience to God and never contractual dealing with any other human institution. This is a fundamental principle and under-girds the specific arguments about sovereignty and authority that follow.

If that is taken seriously as the basis of the Church's legal system, however, it has to be acknowledged that only those who genuinely have an attitude of obedience to God can be asked to play any part in the system of Church governance. The non-belief of many of the officials of the civil legal system must be respected, and they cannot be expected to behave as if they had a covenanted commitment that only Christians could possibly be expected to undertake. It is not possible today to assume that there is a spiritually conscious or covenanted nation around the Church of Scotland. The Church, however, may maintain the legitimate Christian belief that God is ultimately sovereign over the whole world, even in places where he is not recognised as such. The Church has to distinguish between its doctrines (including the sovereignty of the divine over the whole of creation) and the practicalities of constitutional and social engagement (including the recognition that Christian belief cannot be assumed throughout civil society).

### 3. THE DERIVATION OF AUTHORITY IN THE CHURCH

Outlined above is a Reformed view of the Church's relation with the civil order, a relationship of engagement but not of constitutional conformity. It would

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<sup>10</sup> P. Coertzen, *Church and Order: A Reformed Perspective* (Canon Law Monograph Series) (Leuven: Peeters 1998) vol 1, p.8

<sup>11</sup> Coertzen, *Church and Order*, p. 16 quoting Calvin's *Institutes* IV.III.1



therefore be a mistake to adopt, untested and unquestioned, any particular civil law model of power and authority for the Church, even a model that has the sentimental attractiveness of being characteristically Scottish and historically familiar. The construction offered by Buchanan and Rutherford, the will of the people conferred as fiduciary dominion upon their contingent ruler, cannot be blindly attributed to the Church of Scotland; for another model may be a better one for a peculiarly spiritual purpose. That may be hard, for emotional reasons, to accept, not least when the alternative is a model that Scots are proud of having resisted for centuries.

The common understanding of sovereignty that prevailed beyond Scotland, though favoured by the Stuart kings even there, was not the model of popular sovereignty; it was the idea of the Divine Right of Kings. This was the belief that the authority to govern was conferred by God directly upon the ruler, and not through a sovereign populace. In its reflective versions, Divine Right theory contained the limitation of powers; so that it was absolute in the sense that no-one within the ambit of authority was involved in granting it to the ruler, but it was limited in the sense that it had recognised parameters of Natural Law, natural justice, Christian duty and so on. This prevented its being an arbitrary or despotic exercise of irresistible power, and the results in terms of governance could be perfectly benign and advantageous to those who were ruled by it. In short it was not *necessarily* malign, but its potential for despotism attracted hostility and suspicion by Scottish proponents of democracy.

At the end of Chapter One, it was pointed out that Presbyterianism has been regarded by some thinkers as an awkward and threatening force within the British constitution, because it has a kind of non-negotiable determination for God-given self-regulation. That hostile comment is an unintended support to the argument of this Chapter, i.e. that the mandate of the Church is to be free from any force that would compromise its ability to obey the calling of God in a dynamic, flexible way throughout human history. The implication of the historical narrative of Chapter Two is that the Church in sixteenth- and seventeenth-century Scotland behaved rather as if its authority were a divine right granted to the Church's courts.

Which is more consistent with the acquisition of ruling authority in the Church of Scotland: a model of the supremacy of the people or one of direct divine grant? Is the Church of Scotland compromised in its obedience of God by trying too hard to conform to a sentimental Scottish tradition of popular sovereignty?



To illustrate the dilemma: the voting membership of the General Assembly is chosen by Presbyteries and consists of ministers and deacons (not necessarily still active in ministry) who are members of the Presbytery, along with elders (at least nominally still active) who are members of a Kirk Session though not necessarily also of the Presbytery.<sup>12</sup> The voting membership of the Presbytery is appointed in a hybrid way, consisting of all active ministers (fulfilling criteria set out in the legislation) and deacons, along with elders appointed by the Kirk Sessions within the bounds or elected by the Presbytery itself.<sup>13</sup> The membership of a Kirk Session consists of all active and nominally active elders, and they are chosen by one of a number of methods, not all of which involve the congregation at any point, and all of which are subject to the veto of the Kirk Session itself even where the nomination has come from a congregational process.<sup>14</sup> The determination of who shall be the governors of the Church is therefore not a democratic decision; it is not made by the whole people of the Church and in most situations small groups of existing governors appoint from amongst themselves.

Neither is it possible to assert that the members of Church courts, however selected, govern in a manner that might be called ‘representative democracy’. To illustrate again: the provisions of the legislation regulating appraisal of local charges sets out a process of consultation and decision-making, which includes a congregational vote in circumstances where a substantive adjustment will change the shape or resourcing of the congregation. However, this local decision is followed by a decision of Presbytery and the concurrence of the relevant central committee, and either of them is at liberty to come to a conclusion at odds with the declared opinion of the congregational meeting. Members of the congregation have only a right of appeal against the final decision, but not an original right of determination of their own circumstances.<sup>15</sup> The people do not have the final say.

In defence of the system, it must be said that those within it always use the rhetoric of vocation in respect of appointment or ordination to office, and the

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<sup>12</sup> Act III, 2000, the Consolidating Act anent Church Courts (as amended by Acts VII 2001, II 2002 And III and VII 2003) ss. 2-4

<sup>13</sup> Act III 2000 (as amended) ss. 11-27

<sup>14</sup> Act X 1932 (as amended)

<sup>15</sup> See Act IV 1984 (as amended), which is currently giving way gradually to Act VII 2003.

discipline of prayer and intention of spiritual discernment at the point of making decisions (for example by beginning and ending all decision-making meetings with prayer). It is difficult, however, to see what other conclusion can be reached than that the governance of the Church of Scotland is primarily a form of divine right regime and (most of the time) not a form of representative democracy.<sup>16</sup>

This is a hard truth for the Church to swallow, and an even harder one for it to defend. ‘Democracy’ is a heavily value-laden word with entirely positive associations in virtually all its uses: it is a term whose promotion normally guarantees approval in liberal societies, and most people cannot imagine there are any circumstances in which it is not the best form of government for any institution. Some Churches even use it. Democracy, however, is basically a system for enabling the will of the people to determine issues. A sophisticated democracy is less basic, and has safeguards to ensure that the will of the majority does not override precious rights of minorities, which demonstrates that there are occasionally values that outweigh the main elements of democratic process. Presbyterianism, on the other hand, is meant to be a system for discerning and applying the will of God. Its imperfections are largely the function of the imperfection of Church members’ ability to discern God’s will clearly, and mean that often the outcome of a process will have discerned nothing more than the will of the people. Continuing the comparison with democracy, Presbyterianism working very badly indeed will discern the will of a majority that is unconcerned to guarantee rights to legitimate minorities within the Church.

The Church of Scotland must be aware of the true nature of its governance and must take on the near-impossible task of defending a non-democratic system if and when it serves a higher purpose. Almost a century ago the Presbyterian academic John Oman, who was the Principal of Westminster College in Cambridge and a theologian often ahead of his time in ecclesiological thought, reached exactly this conclusion:

‘Christianity is not individualism tempered by the ballot-box.  
Christ Himself says things little flattering to majorities. A unanimous

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<sup>16</sup> Later in this Chapter consideration will be given to the Barrier Act of 1697, which insists on an exercise of downwards consultation at the point at which change is to be made in the areas of the Church’s spiritual independence. Since the Act does not overcome the first of the two problems identified here – it requires only that the undemocratically-appointed General Assembly should consult the undemocratically-appointed Presbyteries – it is not treated at this point of the argument.

vote leaves it still possible that God's verdict is on the other side, while the position of an oppressed minority is apparently to continue to be the lot of His real disciplines. Christianity is "ultra-democratic" not because it counts heads, but because it appeals "to the image of God in all men"... All authority in the Church must speak only in God's name, and that means neither an appeal to episcopal succession nor to popular election, but solely to truth and the spirit of love.<sup>17</sup>

What the noble tradition of Scottish democracy offers to challenge and confront the Church is the daring suggestion that even the commonalty of the people may be capable of conveying intact the will of God. Rutherford clearly had such faith in the populace, but then in his time the whole nation was regarded as in a self-conscious covenant relationship with God. In the Church today there are many who would democratise decision-making as much as possible. In October 2003 the Board of Practice and Procedure of the General Assembly produced guidelines for the operation of one form of congregational constitution.<sup>18</sup> The drafting group agonised about whether it could recommend that congregations adopt the method of electing elders that does involve congregational election, in order to promote the most democratic method as best practice for the Church. The group felt frustrated by the fact that it had not been given any mandate or remit to innovate in the law and procedure of the Church, and could do no more in their final text than list the methods of election showing the most democratic first! Whenever some part of the Church's system of governance falls to be reformed, it is arguably incumbent on the General Assembly to consider whether – all other things being equal – there is a way of discerning God's will that maximises the democratic input. The single constraint on that is that such spiritual discernment<sup>19</sup> always takes priority over the demands of popular opinion where the two appear to be in conflict – where all other things are somehow not equal. As the writers of the Barmen Declaration put it: 'Church leadership activity cannot simply follow the criteria for the human exercise of power and authority.'<sup>20</sup>

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<sup>17</sup> J. Oman, *The Church and the Divine Order* (London: Hodder and Stoughton, 1911), p. 318

<sup>18</sup> The Unitary Constitution, otherwise known as the *quoad omnia* constitution.

<sup>19</sup> It is easy to be cynical about the purity or effectiveness of Church courts' methods of spiritual discernment of God's will. Some meetings are only cursorily opened and closed with a prayer, but otherwise lack any characteristic of a spiritual exercise. It must be recognised, therefore, that this part of the argument describes an ideal, and not a universal reality of experience.

<sup>20</sup> *The Ministry of the Whole Church of Jesus Christ and the Problem of Sovereignty: Statement of the Theological Committee of the Evangelical Church of the Union on Barmen IV*, p. 99

#### 4. THE LIMITS OF AUTHORITY

Except in an absolute dictatorship, every government operates within limitations that have been self-imposed, or have been long recognised as part of the constitution, or have been imposed *de facto* by a greater power to which the government is in turn subject. The authority wielded by that governing power extends only where those limitations do not have effect, and sometimes a ruling body is thwarted from carrying out its intentions because it encounters an immoveable legal or political limitation. If a power that is meant to be sovereign finds that the number and strength of the limitations it faces increases, it may reach a point where it is at the mercy of a power stronger than itself and it may lose the effective ability to make decisions about governance. In that event, a sovereign power may have lost its sovereignty; and it may have happened suddenly and visibly, or subtly and unconsciously.

A number of such limitations have been noted in previous Chapters, and some of them can be translated into the Church's own terms. First, if the jurisdiction possesses a written constitution it may include a bill of rights with implications for government and law making. Even if there is no constitutional bill, government has to consider what human rights are enjoyed by its citizens, and owed by their institutions: more will be said of rights later. Second, the jurisdiction may have a tradition of the principle of the 'rule of law', which means that existing provisions cannot be set aside even for constitutional purposes, and government is obliged to work within the framework of its existing legislation. Third, the principles of the traditions of Natural Law may be recognised, limited to the immutable physical laws of nature (preventing a government from legislating the impossible) or extending to moral propositions universally regarded as self-evidently normative. These would produce a corpus of law that does not require any authority in human law and is morally ring-fenced against change. Fourth, and if the institution under consideration has any constitutional recognition of religion, elements of Divine Law (e.g. the Ten Commandments) may be imported into positive law and, again, form a constraint upon the ruler. Fifth, and most likely to make the difference between a sovereign and non-sovereign regime, power may be severely limited by the sheer refusal of people to recognise or obey it. This may be a problem of vertical

authority, if the ruler's subjects lose their acknowledgement of the legitimacy of the rule; and it may be a problem of horizontal freedom if competing authorities remove their recognition and their self-restraint. Not all of these are limitations in law, but each of them might apply in some way to the authority or influence of the Church as much as they do to a secular government.

The most obvious example of internal limitation is the most famous constraint on the legislative powers of the General Assembly. The Church of Scotland, along with some of its daughter Churches in the Reformed family, continues to be bound by the Barrier Act of 1697. At the time when the constitutional settlement of 1707 between Scotland and England was under discussion, there were Presbyterian fears about the fragility of the guarantee of their forms of worship, government, doctrine and discipline. The Barrier Act is a measure that prevents the General Assembly from unilaterally innovating in these areas, by requiring that such measures be first agreed at one Assembly, then remitted by Overture to Presbyteries for their consideration and reply, and considered further at the subsequent Assembly only in the event that a majority of Presbyteries has approved the Overture. Because one of the areas is 'government', the Barrier Act is a constitutional safeguard that ensures that local voices are heard on the most momentous matters. The Catholic theologian James Mackey has described the Act as 'preventing power from coagulating at the top' of the Church of Scotland.<sup>21</sup> The Barrier Act is currently the subject of consultation with Presbyteries, and proposals for its reform (if any) will be brought to the General Assembly of 2005. If it is to change, it can do so only by the use of its own procedures; and if that seems rather circular it is also significant for the current argument. The General Assembly is clearly prevented from making unilateral decisions on questions of governance: it does not possess total *competenz-competenz*, and so to that extent fails one of the tests of internal, vertical sovereignty.

Alongside the technical limitation that is the Barrier Act, the Church is subject also to the more ephemeral, spiritual constraint that is liberty of conscience in the interpretation of Scripture. The General Assembly has constantly to be aware where its legislative activity would compromise the legitimate beliefs of such a significant number of the Church's members that proceeding with enactment of a

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<sup>21</sup> Mackey, *Power and Christian Ethics*, p. 28



measure would be unwise. There are three measurements the Church must bear in mind in exercising this corporate self-discipline. First, there has to be some way of knowing that a significant number objects to a proposal, and the Barrier Act and other kinds of consultation are helpful in that regard. Second, there have to be some criteria determining the sorts of things that fall within the doctrinal core of the Church's confessional identity and the sorts of thing on which it is reasonable for Church members to disagree. Third, in a Church with the ability to change and develop in the ways argued for above, there has to be a process to determine whether the boundary defined immediately above should change, and whether the fundamental beliefs required of all members (or at least all office-bearers) have expanded or contracted. The last of these would by itself make a fascinating theological study, and can be illustrated by both encouraging and sinister examples, according to your point of view. An affirming example might be that fact that differences of views about baptism seem to be becoming more acceptable amongst office-bearers, and the Church gives the impression that it acknowledges a variety of sacramental points of view. A recent example that many would find sinister, on the other hand, is the behaviour of those who do not accept the compatibility of homosexual orientation with Christian belief and who have taken to refusing the hospitality of their pulpits to those who take a different view of a subject that is certainly not a question of confessional orthodoxy.

There are many delicate strands to the question of liberty of conscience, but it is a vitally important area to get right if the governance of the Church is to be regarded as serving the sovereign love of God. First, the individual conscience has no more unfettered or absolute a priority than any other kind of influence or authority. Second, the Church has to decide what are the bounds of legitimate diversity of view within a body that is defined according to common belief. Third, the General Assembly has to keep some kind of doctrinal foundation as a standard to which members must measure up. Beyond that central core continues the debate about the way in which the Church arrives at its beliefs, the issue of the tyranny of majority opinion over minority voices and the problem of the dilution of the Church's identity by maverick points of view. This debate has been current within the Church of Scotland for a long time. In the mid-eighteenth century, around the time of the Secessions from the Established Church, there were arguments among the courts of the Church about the power of the General Assembly to legislate against

the conscientious decisions of Presbyteries and in ways that its critics felt were contrary to the teachings of Scripture and human conscience.<sup>22</sup> In Chapter Two, reference was made to the group sometimes known as the ‘Popular Party’ and its belief that the Assembly’s authority extended only so far as it was itself consistent with the established principles of doctrine, worship and discipline. This group argued for the power of Presbyteries to judge all the Acts and orders of the General Assembly before deciding whether to obey them.<sup>23</sup> This, it is hastily added, is not an attitude to the Assembly tolerated in Church law today but it illustrates the fact that, of all the constraints suffered by civil and ecclesiastical authorities, the risk of losing the obedience of one’s subjects is one of the most dangerous. The sovereign freedom of the law-making machinery of the Church is at the very least severely cramped.

This is one of the points at which a change of perspective solves the problem, focusing not on the exercise of sovereignty as coercive of people’s beliefs and behaviour but on the exercise of diakonal authority in service of the members of the Church. A Church that regards diversity of view as a necessary evil (to be tolerated as far as external constraints require it to do so) is a Church that intends to change as little as possible. It is a Church likely to take a Free Church case view of its identity, conserving and preserving traditional teaching for its own sake and avoiding future doctrinal reform. A Church that serves diversity of opinion and does not enforce conformity any further than it has to, is a Church that is giving God every chance to reform and transform it, understanding its traditional teaching but presuming nothing about the Divine will. It is entirely possible that God intends to maintain most of the doctrinal tradition of the Church, but the Church cannot prove that as a certainty. The former model of ecclesiastical sovereignty does not maximise God’s room for manoeuvre; while the latter leaves it open to God to move the Church forward, *or not*, as the Church’s reading of Scripture and wrestling of consciences allows. This conclusion is a liberal plea not for dogmatic revolution but for structured openness to the leading of God; it is a twenty-first century recasting of the New Licht tradition without making any judgement as to whether any new licht happens to be shining.

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<sup>22</sup> McIntosh, *Church and Theology in Enlightenment Scotland*, ch. 3

<sup>23</sup> *Ibid*, p. 110-112

## 5. THE CHURCH AND LEGAL SOVEREIGNTY

Lawyers, however, are little interested in the theological and doxological uses of the term ‘sovereignty’, or in the Church reflecting the divine sovereignty by enabling diversity of opinion, or even in the relationship of Church and society being based on a covenant relationship with God. Theologians may prefer to broaden the meaning of the concept of sovereignty to recover its true divine origin. Lawyers have to advise on altogether more pragmatic things: things like the efficacy of regulations to manage resources, the mechanisms available to ensure that particular conduct receives a particular sanction or the scope of the organisation to benefit from the civil law’s recognition of the rights of a religious body. Lawyers need to know where, if anywhere, there lies a sovereign power within the Church, and how it relates to the equivalent power in the civil order. However, according to Steve Bruce writing about the changing patterns of religion over the centuries, religion has been vulnerable to a kind of fragmentation of power since the Reformation, when Christianity lost its single sovereign point (i.e. the Papacy) and the institutional Church was no longer a universal authority.<sup>24</sup>

As fast as the authority of the Church seems still to be receding and its power to compel to be further disappearing, its partners in legal engagement beyond its own bounds seem also to be fragmenting and becoming difficult to identify. For some purposes the point of sovereign authority is now located somewhere above the level of the nation-state, as international institutions increasingly exercise powers of regulation and compulsion of behaviour by and within the older units: the regulation of trade within the European Union is the most vivid example of that from a British point of view. For some purposes the sovereign authority is located, in practice, below the level of the nation-state, as different kinds of communities acquire authority of self-regulation inside the older unit: the habit of non-interference by the Westminster government in the decisions of the current Scottish Parliament is the most vivid example from the Scottish point of view. For some purposes, any kind of sovereign power in law is ineffectual: the impotence of governing authorities to regulate traffic on the internet is a globally vivid demonstration. A contemporary American theologian working in the area of Church and state, Larry Rasmussen,

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<sup>24</sup> S. Bruce, *Religion in the Modern World: from Cathedrals to Cults* (Oxford: University Press, 1996), p. 22

observes that the nation state has been the chief actor with which the Church has had to deal for the past two hundred years. He points out, however, that it is no longer the only chief power, because it is too large to deal with local problems and too small to deal with global ones.<sup>25</sup> In the British context, a recent commentator on Church establishment pointed out:

‘While historians have become accustomed to asking in the past, if inadequately, how the British State has accommodated different Church-State relations within its territory – on the assumption that the State itself was stable – that assumption can now no longer be maintained.’<sup>26</sup>

There is no point in using language that has lost its points of reference; and a phrase once useful in the analysis of Church-state relations – the Two Kingdom theory – has to be translated into a new reality. Neither Church nor state can safely be assumed to be monolithic institutions that can relate to each other as legally competent actors, alone sufficient to exhaust the relations of the sacred and the secular. The underlying concept is not invalid, because there is still a reasonable distinction to be made between the Body of Christ (the Church) and the rest of creation (the world). For legal purposes, however, it is important to acknowledge that the powers that be on either side of that traditional divide are complex groups of authorities, not single authorities. The kingdoms are as much God’s as ever they were, but to describe them as just ‘two’ no longer works in a discussion of laws.

In that case, the relations between Church and state might exist in all sorts of connections, not between two points of sovereign power but between two complex communities within what, in Chapter One, was termed a network of social geometry.<sup>27</sup> If the *societas perfecta* has lost its perfection, it is necessary to focus on the realities of *communio*. The engagement of the Church with the civil order may take place in the supra-national and local strata, and not just as a formal legal relationship between the law of a General Assembly and the law of a national

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<sup>25</sup> L.L. Rasmussen, *Moral Fragments and Moral Community: A Proposal for Church in Society* (Minneapolis: Fortress, 1993), p. 149

<sup>26</sup> K. Robbins ‘Establishing Disestablishment: Some Reflections on Wales and Scotland’ in Brown, and Newlands, editors, *Scottish Christianity in the Modern World*, p. 249-50

<sup>27</sup> P.G. Kauper, *Religion and the Constitution* (Baton Rouge: Louisiana State University Press, 1964), chapter I describes the dispersal of governmental power in both kinds of institution, and prefers the more general distinction of civil and religious communities, recognising the partial overlap of membership between them.

parliament. For instance, the contribution made by the Conference of European Churches to the preparation of the European constitution document in the autumn of 2003 is as much an engagement between different kingdoms as are the activities envisaged by the framers of the sixth Article Declaratory.

The Fourth and Sixth Articles Declaratory were framed to ensure that the Church of Scotland was both national and free. The argument of Chapters Four and Five demonstrate that the Articles and the Act that acknowledged them were not framed to promote or preserve the Establishment in law of the Church, but historians and commentators tend to be unable to resist thinking in that category and they read into the Scottish Church-state relationship something that is not there. In the same way legal theorists, from Figgis writing at the time the settlement was framed to MacCormick writing in our own generation, have read into the settlement a granting of legal sovereignty over an identified dominion, something that was scarcely secure to begin with and virtually impossible to argue exists any longer. The Church has conspired with this misconception, clinging to the fragile belief that the extent and nature of its jurisdiction was monolithic, unambiguous and safe from outside challenge. In a study of the relationship between theology and social theory, John Milbank puts it this way:

‘... a Church which understands itself as having a particular sphere of interest will mimic the procedures of political sovereignty, and invent a kind of bureaucratic management of believers.’<sup>28</sup>

The point is made with particular reference to the Church of Scotland in Will Storrar’s article examining the relationship between the Church and what he calls the institutions of modernity.<sup>29</sup> Storrar argues that the contemporary decline of the Church of Scotland as a national institution can be accounted for by its close partnership with the institutions of modernity, in which he includes the nation-state. By this he means that the Church in the twentieth century took on many of the characteristic social features of modern organisations, not least a rational bureaucracy that had first been developed by the Free Church through the Sustentation Fund that provided funding from congregations for national management and initiatives. The secular institutions associated with modern,

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<sup>28</sup> J. Milbank, *Theology and Social Theory: Beyond Secular Reason* (Oxford: Blackwell, 1990), p. 408

<sup>29</sup> W. Storrar, 'The Decline of the Kirk', *University of Aberdeen Alumni Association News*, No 18 Autumn 1997, p. 5-8



rational, bureaucratic forms of management have begun to lose their power and influence; and the Church is losing its power and influence to the extent that it has made itself such an institution. The conclusion of this argument is that the Church must not try to revive what it has been, allied to a civil society that has left the old nation-state model behind. Instead the Church should accept that it is changing into something else, and find new ways to relate to what in the language of this thesis would be called a different social geometry. This is a plea for the institutional Church to welcome the analyses of post-modernist thought; and it reflects the use theologians in many disciplines are making of the possibilities of new ways of thinking about language, thought, belief, metaphor etc.<sup>30</sup>

Perhaps those who feel frustrated by the Church's bureaucratic institutions are really experiencing the frustration of wrestling with an institution that is hitched to a model of state-like sovereignty that belongs to a passing age. The staff of the Church's central agencies do not, for the most part, believe they are regulating and constraining behaviour or imposing laws, but the popular perception is that they are a kind of civil service running a piece of legal machinery producing diktats that cannot be resisted by the rest of the Church. If the Church believes it is a sovereign institution governing a sphere of influence, what might be called a 'realm', for all purposes connected with worship, Church government, doctrine and discipline, then it is obliged to provide rules, mandates and authority throughout those areas – for its whole sphere of historic responsibility -, and that adds to the weight of bureaucracy.

If the Church is liberated from that all-inclusive responsibility for a historical 'realm', its task is only to provide minimal regulation – on a case-by-case basis – where that is necessary to maintain the fundamentals of Christian doctrine, and to enable Church members to put their obedience to God before human authority. Consciously or unconsciously, the Church knows that it needs a structure that models, promotes and protects spiritual freedoms for the institution and its individual members in the service of God who is the only sovereign. That is a clear and theologically satisfying basis for conclusions about the efficacy of the 1921 settlement, much more so than the distracting assumptions of legal philosophy about

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<sup>30</sup> Many examples of the adoption of post-modernist thinking by theology are contained in K.J. Vanhoozer, ed., *The Cambridge Companion to Postmodern Theology* (Cambridge: CUP, 2003) especially in Part Two of the book.

the possession of a fixed, self-contained domain of sovereignty in law that turns out to be unnecessary.

## 6. SPIRITUAL FREEDOM: SPIRITUAL JURISDICTION?

‘The idea that the church needs its own distinctive spiritual dispensation, which differs from the civil dispensation, as well as a judicial power as an order to maintain the spiritual dispensation... has through the course of time continued to function to a greater or lesser extent in Reformed Church government.’<sup>31</sup>

The Church’s interest is in maintaining the freedom to obey God without unnecessary interference from secular forces. Spiritual freedom has been the fundamental issue in Church-state relations throughout the history of the Scottish Church, and every other issue (Establishment, sovereignty, National Covenant, patronage and the like) has been scrutinised, assessed, attacked or defended against the criterion of the service of that spiritual freedom. There are two possible directions from which the formal recognition of freedom can come: the Church can conduct and organise itself as if it possesses freedom to behave in certain ways, or the rest of society can treat the Church as if it possesses that freedom. Recognition may consist of a mixture of both. In this section the first of the two sources of spiritual freedom, the Church’s independent spiritual jurisdiction, will be described in a new way. In the next section a description of the Church’s proper relationship with human rights principles, the main contemporary basis of external recognition of religious liberties, will be attempted.

The internal legal authority of the Church of Scotland consists primarily of the Acts, Regulations and Deliverances of the General Assembly along with the Deliverances of its lower courts. They are the mechanism for the ordering of the domestic life of the Church, the development of its doctrine, and the determination of disputes (including those where the conduct of a member or office-bearer calls for rebuke or for exclusion from a privilege or responsibility held). There is no justification for that authority beyond those purposes, because they are the ways in which the Church exercises a limited, spiritual freedom. The heart of this thesis is that the Church’s legal system is not, after all, a sovereign authority akin to a mini-

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<sup>31</sup> Coertzen, *Church and Order: A Reformed Perspective*, p. 91

state. It has not the power to fend off external challenge from civil law, nor the internal power to compel the behaviour of its subjects, nor any of the other characteristics of sovereignty identified in the course of this research.

The legal philosophy of the Church needs to abandon the long-used language of ‘the co-ordination of jurisdictions’ and the obsolete phraseology of Article IV. It was written for a time when the interference of the civil magistrate in matters of worship, church government, doctrine and internal discipline was a living memory: the Article describes the constraining of the civil law in areas it is hard to imagine fall within the scope of the civil law in any case. The civil magistrate has no mandate or motive to encroach on matters of indifference to it and will not interfere in the regulation of spiritual experience within the Church of Scotland, at least not any more than it would within other religious organisations differently constituted in law. The Church by the same token has virtually no reason to fear the elements of civil law that do apply to it and should not try to avoid secular jurisdiction by needlessly inventing an alternative provision to address a common problem. After all, in the Reformed tradition the classic ‘Two Kingdom’ theory has, ever since Melville’s exchange with James VI at Falkland, asserted that the secular as much as the sacred is subject to the ultimate sovereignty of God.

Lord Mackay was right to resist the language of ‘minimising’ the extent of the Church’s jurisdiction, since that implies that the Church has a discretion or choice about the extent to which it reduces its supposed ‘sphere’ of authority. He pointed out that in any situation the facts of the case have to be measured against the 1921 Act and Articles Declaratory, and the spiritual jurisdiction of the Church either will or will not apply. The current argument is suggesting that the criterion of this application should not be the notional extent of the jurisdiction of the institutional Church – as if that were fixed in advance. It should be an assessment in each case of whether the Church needs to regulate each particular matter internally, in order to have complete freedom over a matter that has no secular relevance.

This argument prefers a minimal jurisdiction of freedom before God to one of sovereign legal power, and the thesis has provided plenty of limitations to reduce even that residual jurisdiction.

First, the only justification for resorting to authority that does not recognise the writ of the civil law in any case is obedience to God within a covenant

relationship with God. The matter must be one in which the Church's considerations are fundamentally different from the principles of civil law, and the civil law either has nothing to say on the matter or is likely to come to a conclusion incompatible with the Church's understanding of the will or command of God. In a free and non-despotic society in which Christian people are numerous and able to express themselves in the worlds of law and politics, the resort to a separate body of Church law should not be necessary very often, especially if the sovereignty of God over the whole of life is taken seriously by Reformed theology. Where those issues arise that require the Church to insist on independent action, they should be explained and defended vigorously and unapologetically, and the Church should have the confidence to differ from the civil law when it has to.

Second, the justification for spiritual independence of action in these situations has to be from the Divine Law, i.e. from Scripture and Christian tradition as understood by the Church. The other kinds of limitation on authority described earlier (Natural Law, natural justice, and so on) all apply as much to civil law as to church law, but Divine Law alone informs the Church's unique witness. This Chapter has indicated a preference for a dynamic view of Divine Law, a belief that the Church *semper reformanda* is something more than a body finding new ways to be faithful to an unchanging calling, an expectation of 'new light' for the Church. The immense doctrinal implication of that preference is not pursued in a thesis about church law, except to point out that the existing constitutional settlement serves that end better than do the constitutions of the smaller Churches in Scotland.

Third, the Church should lose its traditional fear of exposing the terms and conditions of its servants to the regulation of the civil law. There is a challenge to the Church to examine the parts of its law in which it gives what it calls 'equivalence of protection' from within its own provision instead of recognising the application of the original protection of the civil law. For instance, when a minister is pregnant, she has rights that are based on a Regulation of the General Assembly, not on a civil law right; and this is an example of what is meant by 'equivalence of protection'. It would be simpler of course if ministers were subject to the employment law of maternity rights in the first place, so that the Church need only decide on the extent of its provision within the civil framework and not have to invent a complete system of its own. Equally, the Helen Percy/Douglas series of actions in both civil and church law foundered on the failure of the Sex Discrimination Act to provide a

remedy for someone in her position, because she did not have a contract of employment. It would be simpler, again, if ministers were subject to the employment law of sex discrimination, which the Church surely has no reason to fear. In each case the General Assembly would have to make a concession and let go of its insistence that the civil law should not apply.

Fourth, the Church must abhor conducting itself in a way that gives a counter-witness to its demands of secular society. The Church says what it believes are prophetic things from time to time about the way in which secular government governs, the decisions and policies it adopts and the ways it treats people and secures justice. The same Church cannot provide a poor system of justice, a corrupt administration of policy, or a legislative process that fails to consider the will of God through the prompting of the Holy Spirit. It cannot have policies that discriminate for no good reason, or devalue minorities, or remove people's personal liberties including liberty of opinion. This is a hugely difficult standard to keep, because the breadth of opinions within the Church leads some people to regard one stance as reflecting the divine law while others regard the same stance as nothing more than an insulting deprivation of rights (the argument about the ordination of homosexuals is the obvious illustration of this). The difficulty of implementing the standard is not an excuse for failing to try, or forgetting the general principle.

This section has described a philosophy of church law that is clearly not the one that the framers of the 1921 settlement were pursuing. It is a contemporary contribution to the Church's internal – and much-neglected – discipline of jurisprudence. At the end of this chapter, these contributions will be used to produce a new wording for the Fourth Article.

The external elements of the Church's law relate increasingly to the near-universal belief in the existence of fundamental human rights.

## **7. SPIRITUAL FREEDOM: HUMAN RIGHTS?**

If the Church faces a challenge in defending a system of government that is unapologetically non-democratic, it certainly faces another in responding to the contemporary culture of human rights claims and language. Chapter Four examined



the limitations of secular rights theories as a basis for spiritual freedom: this section explores what place human rights may legitimately have within the Body of Christ.

The late twentieth century adoption of human rights codes and the enshrining of their provisions into domestic law marks the acceptance of a special kind of relationship between individuals and the legal system, a relationship based on high-ranking claims in the hands of the individuals. The relationship between the Church and its individual members is quite different. The Church is the body of Christ in the world, so the member's relationship with the Church is based on the providence of God and the response in love and duty of the individual, and the individual focuses on what God has already done for him or her, not what more he or she can demand of God. Human rights do not traditionally figure in the divine relationship and do not provide a model to understand the human response to the Gospel. In the third of his Reith Lectures of 1978,<sup>32</sup> the Anglican theologian and historian Edward Norman warns against the confusion of human rights with the fundamentals of Christianity, because he fears the former are based on arbitrarily chosen elements of Natural Law arguments and elevate Western liberalism to the status of eternal truth. In the language of this thesis the problem may be put this way: if the sovereignty of God is exercised in covenant with the Church, and a covenant consists of unilateral acts of self-giving and not a contractual act of negotiating, then there does not exist in the conversation between people and God a mechanism to demand rights. If the sovereignty of God is exercised also in a diakonal manner, God giving himself, his Son and his Spirit utterly in love for the world once for all in the Gospel, there is nothing left to claim of God, and so the language of human rights does not make sense within the spiritual jurisdiction.

Where the Church or the people of the Church have rights, it is in their relationship with the world beyond the institution and in relating to society at large. The Church can often give its most impressive witness to the Gospel when its members deny themselves the rights other people might press, for example when an act of forgiveness deflects a legal action, or a religious group endures persecution without seeking the protection of civil law. The Church cannot, however, expect other people to deny themselves the rights they may have in civil law against the

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<sup>32</sup> E. Norman, *Christianity and the World Order* (Reith Lectures 1978) (Oxford: OUP, 1979), lecture III

Church itself. The legal philosophy of the Church needs to have an understanding of rights and their correlative responsibilities.

Chapter One explained that there were two ways of regarding rights, one of which treated them as little spheres of sovereignty and the other of which regarded them as privileges guaranteed by a greater, sovereign authority. The first of these views concluded that the human rights of others constituted one of the (horizontal) constraints on the sovereignty of the institution, while the latter regarded them as one end product of good government. In the last few years the Church of Scotland has shifted from the first to the second model. It no longer regards people's rights as merely a potential threat to the Church's authority, but examines the content of rights codes like the European Convention and introduces that content into the corpus of the Church's law, especially its procedural law, wherever it feels it should. In other words, this is the very part of the life of the Church in which equivalence of protection has a place. The exercise of the independent spiritual jurisdiction is legitimate in terms of the principles sketched in the previous section, and that exercise of authority is modelled so far as possible on what is self-evidently desirable in legal process (right to fair trial, proper rights of appeal etc). Politically, it would in any case be foolish of the Church not to grant these rights. Whilst it is conceivable that society will sympathise with the Church when it wants to hold out against some element of the substance of civil law for reasons of theological conviction, it is hardly likely that the Church will gain much sympathy in denying to individuals rights that most people regard as non-negotiable.

With regard to the relationship of the Church with external authorities, the prominent thinkers interviewed in Chapter Five had a reasonable consistency of view, regarding rights as providing a minimal protection for the freedoms of the Church but not as providing the full extent of the Church's spiritual independence. The Church does not ask for its jurisdiction over spiritual affairs to be granted to it as a fundamental human right (though the Conventions arguably concede it in exactly this way); rather the Church's claim is for a jurisdiction that belongs to God, the divine right that has cropped up in various places in this thesis. This is why the element of a granted spiritual jurisdiction, described in the previous section, remains part of this overall thesis, and why the model of popular sovereignty has been discarded. The constitutional basis of the Church is not a human right; it is a divine right.

The situation is similarly qualified in respect of the vertical (internal) relations of the institutional Church with those subject to its authority. The Church has never taught people to claim rights against God in the way individuals can claim rights against governments and courts. The Biblical and saintly tradition of arguing with God and demanding justice is always an appeal to God's own sense of justice, never an attempt to extract something from an unwilling duty-bearer. Church members cannot coerce the Church into granting them their rights, just as the Church cannot coerce the behaviour of its members. It is vital, therefore, for the institutional Church to find another way to confer the individual benefits that rights normally convey. If there is any danger that Church members will be thwarted from having the same freedoms in their spiritual lives as the civil law gives them in their family life or employment or welfare provision, the Church must be conscious of a moral duty to make unilateral provision of equivalence of protection within the scope of its own governance. God privileges his people, we believe, not because he has a duty to do so but because he wants to; and the Church's task is to make that privilege real.

Alongside the procedural justice already mentioned, an important part of the substance of that protection according to the earlier argument of this chapter is the liberty of conscience that is one of the guarantees of the theological dynamic of the Church. This thesis has discovered that the Church of Scotland has a significant constitutional privilege over other denominations<sup>33</sup> – that it probably never has to face a 1904-type trust-deed argument. Because of this, it is uniquely able to change and develop in freedom from civil law challenge. Some other denominations will rightly argue that belief in a 'once for all' revelation means they have no need to grant much liberty of opinion to their members and adherents. The national Church has a different foundation in law, one that suits its theological calling, and one of the jobs of the General Assembly must therefore be to make sure that the diversity of opinion within the Church is served and protected and that the doctrinal core required of members and office-bearers is not exaggerated. The culture of human rights gives the Church a paradigm for guaranteeing that its beliefs develop from the experience

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<sup>33</sup> The only other Church in Scotland that ought to be able to invoke protection against the 1904 precedent is the United Free Church, the denomination that remains from the remnant that did not enter the 1929 Union. Chapter Three above narrates the legislative steps taken immediately after 1904 to prevent the problem repeating within that Church. The United Free Church is one of the smaller denominations, however, and does not have the sorts of problems that a very large or self-consciously national Church can do.

of its members, their conversation and debate, the constant engagement with Scripture, tradition and prayer, and openness to the living guidance of God.

Human rights provisions are not sufficient to provide for the whole scope of the Church's freedoms in law, but they can provide the fundamentals of minimal protection and they can inspire the way in which the Church behaves towards those who have never been able to make any claim against its authority.

## 8. THE TASK OF THE CIVIL MAGISTRATE

One by one, in the course of this thesis, the functions of the civil magistrate in supporting the life and governance of the Church of Scotland have been seen to evaporate. Some clearly vanished a long time ago: it is centuries since state legislation authorised or anathematised a Church other than the national Church, there is no longer a civil property right attached to patronage of a local congregation, and so on. Other elements of civil support remain debatable, but this research suggests they do not have the relevance some people claim for them. The Church of Scotland is not an Established Church any more (either in the sense it once was on the Genevan model of Establishment, or in the manner of the Established Church of England).<sup>34</sup> The Accession Oath probably does not constitute a barrier to change, since constitutional means would be found to recognise even a major change in church government provided that the Church itself legitimately chose it. In fact the 1921 Act and the Fourth Article Declaratory are probably the only elements of the 'efficient' part of the British state that affect and secure the life of the Church of Scotland. The relationship between Church and state is transacted at the level of the 'dignified' elements of both. In the sixteenth century Andrew Melville argued that the civil magistrate should exercise his authority in support of the Church but not over it:<sup>35</sup> now it is hard to see how even the former happens in any measurable way.

The way in which civil institutions support the cause of the Church is much more indirect today. In law making, the government acts against fraud, violence, dishonesty and abuse: it does so not because they are regarded as vices by Christians

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<sup>34</sup> For a treatment of this loose form of Establishment, see W. Carr, 'A Developing Establishment' *Journal of Theology* CII 1999, 2-10

<sup>35</sup> See Chapter 2, above.

only but because politicians are given a mandate by the whole electorate to take those measures. The Church may benefit indirectly by the suppression in law of what are sins according to its teaching and may even take some of the credit because the Christian perspective of some of the legislators informed their voting record. In fact the government has done no more than the task that Luther believed it has, of creating the conditions in which the Gospel may thrive without straying from its area of authority into that of the Church. The law may benefit the Church, but that does not necessarily mean there remains any formal state allegiance to the Church. At most, as the Catholic James Mackey suggests, the nation expects the Church to preach a philosophy that in turn will have a beneficent effect on the state's legislation.<sup>36</sup>

The institutions with which the Church engages are not just those from whom it asserts its independence in law, and neither are they only national institutions. The Church is elbow deep in society: from the provision of chaplaincy to the armed forces to the provision of school chaplaincy by local invitation; from the collaborative relationship between the Scottish Parliament and the Scottish Churches Parliamentary Office to the involvement of local congregations in community initiatives; from the kirking of the Parliament to the kirking of local councils – or even the kirking of a Gala Week Queen. Church and society have expectations of each other based on goodwill and partnership within the network of social geometry (the more flexible definition of 'the state' offered in Chapter One) that is the context of both parties.

## **9. REFORM WITHIN THE ARTICLES DECLARATORY**

In theory, the 1921 settlement remains the foundation of the constitution of the Church of Scotland as a legal institution. Because of its weaknesses and the external pressures upon it over the last eighty years, it plays little role in the lives of Church members, office-bearers and ministers, and most Church people are quite unaware of the Articles Declaratory or the events that led to the Union of 1929. Most ministers would not be able to identify most of the Articles, and tend to be

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<sup>36</sup> Mackey, *Power and Christian Ethics*, p. 127



much more familiar with parts of the documents that formed the Basis and Plan of Union of 1929, as these include the preamble and formula used at ordinations.

This thesis has described a process that might be termed ‘obsolescence by a thousand cuts’ afflicting the settlement, especially the Fourth and Sixth Articles. First, the terms of the settlement itself were flawed from the outset, exposed to the dangers set out in Chapter Three. Second, the case law of the twentieth century described in Chapter Four began to undermine the model of ‘sphere’ jurisdiction. Third, the partnership of Church and state changed on both sides under the pressure of forces like ecumenism, secularisation, federalism and globalisation. Fourth, in this study in particular, the sovereignty-based model of Church authority has been put into question theologically, casting profoundly into doubt the intention of those who framed the settlement in terms of ‘spheres’ of sovereignty.

The current position of the Church vis-à-vis civil society is not openly under threat; there is no one scheming to have the 1921 Act repealed, or another denomination particularly privileged, or the ceremonial connection between the General Assembly and the Crown dismantled. But neither is the Church’s legal position entrenched in civil law, since it is no longer a matter solely in the hands of the Westminster Parliament. The Church has to recognise an increasing precariousness in its occupation of a singular place in an increasingly complex British establishment (using that term in the non-technical sense).

The Dutch Dominican theologian Edward Schillebeeckx, describing the way that God and people search each other out, talks of God as being defenceless without necessarily being powerless.<sup>37</sup> The argument of this thesis is essentially the application of that idea to the institutional Church of Scotland, by asserting (1) that the freedom to obey God is given by God and ought not to be contingent on the provisions of civil law; (2) that the support, protection and Establishment of the Church in Scotland were mixed blessings when they existed and no loss now that they do not;<sup>38</sup> and (3) that the Church has to be a community messily engaged with the larger community in which it is set and to which it is sent, not a perfect legal

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<sup>37</sup> E. Schillebeeckx, *Church: The Human Story of God* (London: SCM, 1989), p. 90

<sup>38</sup> The blessings of Establishment included the financial support of the Church and especially the ministry in the period of patronage, and the guarantee of the preservation of the Presbyterian form of Church government at the time when the Union of Parliaments produced fears of an Anglican monopoly of national religion in Britain.

society interested only in self-preservation and the exercise of authority. The Church of Scotland is much more defenceless than it appears in law, and so it has to learn to be powerful, if at all, in rather different ways.

This chapter ends, therefore, with a suggestion of what that rather different way of being powerful would look like translated into the terms of the Fourth and Sixth Articles Declaratory. These Articles, brought up to date and furnished with a theologically defensible foundation, would once again become useful and relevant to the Church's engagement with Scottish life – and that cannot be said for the existing version. Neither of these Articles has been changed since they were first framed, but the mechanism to change them exists. It is contained in the Eighth Article and is modelled on the procedure of the Barrier Act, except that the innovation has to be approved by three consecutive General Assemblies and by two thirds of all Presbyteries in both intervening years. The existing and proposed wordings are set out for each Article, and are followed by some observations about the changes to their terms.

The Fourth Article currently reads:

‘IV. This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by the civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of the government and jurisdiction as derived from the Divine Head of the Church alone, or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.’

If my argument is convincing, the Article might be better worded:

‘IV. The Lord Jesus Christ who alone is sovereign has appointed in this Church a government in the hands of Church office-bearers. The Church receives from Him, its Divine King and Head, and from Him alone, the freedom to legislate, to reform, to declare, to administer and to adjudicate finally (recognising liberty of opinion on

such points of doctrine as do not enter into the substance of the Faith)<sup>39</sup> in matters of doctrine, worship, government, and discipline. This freedom shall be exercised wherever no equivalent provision is made in civil law (including employment law) and otherwise wherever the teachings of Scripture and the traditions of the Church are inconsistent with the substance of civil law, of the existence of which inconsistency the Church is sole judge. The freedom to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, the mode of election of its office-bearers and the boundaries of the spheres of labour of its ministers and other office-bearers, is reserved to the Church. The jurisdiction of the Church does not extend to the enforcement of its decisions by compulsion, either directly or with the aid of the civil law. Any recognition by the civil authority of this power of separate jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of the government and jurisdiction as derived from the Divine Head of the Church alone. Civil legislatures have the responsibility to determine for themselves all questions concerning recognition of the spiritual jurisdiction and the obligations arising therefrom.’

In the new text, sovereignty is attributed to Christ alone and there is no implication that it is an attribute of the Church as a legal institution. The authority exercised by the Church continues to be clearly the subject of a direct divine grant, and no mention is made of rights as a basis for the relationship between the Church and its constituent members or as a basis for the relationship between the Church and any external authority. The previous language of a right to adjudicate, subject to no civil authority, in all questions belonging to certain categories, is removed. Likewise the presumption of the old wording, that a sphere of non-interference of the civil magistrate was definable, is abandoned. The defencelessness of the church is emphasised in several ways: by its inability to coerce the behaviour of individuals; by its inability in particular to coerce the consciences of its members; and by its inability to force the recognition of its spiritual freedom to reform, by the civil magistrate. The Article now describes spiritual freedom without legal sovereignty.

The Sixth Article currently reads:

‘VI. This Church acknowledges the divine appointment and authority of the civil magistrate within his own sphere, and maintains its historic testimony to the duty of the nation acting in its corporate capacity to render homage to God, to acknowledge the Lord Jesus

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<sup>39</sup> The phrase in parenthesis is a direct quote from the Preamble used at services of ordination, being part of the texts of the Basis and Plan of Union of 1929.

Christ to be King over the nations, to obey His laws, to reverence His ordinances, to honour His Church, and to promote in all appropriate ways the Kingdom of God. The Church and the State owe mutual duties to each other, and acting within their respective spheres may signally promote each other's welfare. The Church and the State have the right to determine each for itself all questions concerning the extent and the continuance of their mutual relations in the discharge of these duties and the obligations arising therefrom.'

If my argument is right, this Article could be worded as follows:

'VI. This Church, as the Body of Christ within the larger community, undertakes to render homage to God, to acknowledge the Lord Jesus Christ to be King over the nations, to obey His laws, to reverence His ordinances, and to serve the Kingdom of God. The Church asserts God's divine authority over civil rulers in international and national law and in local communities. The Church of Scotland maintains its historic testimony to the duty of society to honour the Church and acknowledge its spiritual freedoms, including the freedom to be continually reformed, the freedom to criticise and the freedom to obey God even to the extent of coming into conflict in law with secular authorities. The Church calls secular society into a covenant relationship, in which the Church is the servant of society, but in which each may signally promote the other's welfare.'

In this new text, spiritual obligations are entirely absorbed by the worshipping community. This is not to deny to the Church the right to call the nation to render homage to God as the existing Article says, but the formal declaration of the Church's legal constitution is not the right place to articulate that challenge. The Articles Declaratory are a declaration of legal relationships, not a homiletic text: they define what Church and society may formally require of each other, not what either might hope to inspire the other to do.

The residual elements of the old Two Kingdoms theory remain in the assertion that the civil magistrate is – in the eyes of the Church – as much a divine appointment as is the government of the Church. The fragmentation of secular sovereignty is recognised by the transformation of the 'State' language of the old Article into the 'society' and 'community' language of the new. The new wording does not abandon entirely the element of what might be called a minimal Establishment; it retains the expectation (a realistic one, according to the interviewees in Chapter Five) that the civil magistrate pays some honour to the Church and concedes the non-negotiable spiritual freedoms that the Church will insist on in any case. Formal legal Establishment, either of the Genevan or of the English type, finds no place. The implication towards the end of the old Article that

Church and State owed each other mutual support, as if they were bound to one another by some sort of pact, is replaced by an expression of a covenant relationship. Here the Church makes a unilateral promise to promote the welfare of the broader community and should do no more than hope that some reciprocal promotion of its own welfare matches its gesture. The language of the spheres has gone, along with the duties of secular society towards the Church and the calculation of the extent and continuance of responsibilities and relations.

The written constitution of the Church of Scotland is gradually desiccating: its usefulness is waning and the power of its terms is gradually becoming, as Steve Bruce said, risible. Because of this, the national Church is becoming more like the other denominations in Scotland, behaving like a voluntary association and being treated like one in civil law. In turn, the doctrinal life of the Church is equally in danger of desiccation, as some ministers and office-bearers behave as if the only thing to do with the doctrinal corpus (beyond the core contained in Article I) is to preserve it and defend it from any change. A General Assembly, or rather three consecutive Assemblies, courageous enough to change the Articles Declaratory, can enable the Church to redefine itself in terms of its engagement with the kingdom of God in the world and free itself from the risk that the law of the Church or the law of the land cannot keep pace with *ecclesia semper reformanda*.



## CONCLUSION

The Church of Jesus Christ, in any of its manifestations, cannot remain an entirely unworldly body. Every Church is a hybrid institution, part intangible spiritual movement and part tangible legal organisation. That tangible part always has some kind of recognition, alongside all sorts of other human institutions, in civil law. The nature of that recognition varies from age to age and from country to country: pre-Constantinian Rome, post-Reformation Geneva and twenty-first century America illustrate the variety of experiences the Church has had with civil engagement.

The original Scottish Reformed approach, adopted and adapted by John Knox from Jean Calvin, was characterised by two things: first, the distinction of the sacred from a secular authority that had no proper interest in it; and second, the relationship of mutual support between the two. As the historical narrative in Chapter Two demonstrated, the Church's articulation of this relationship changed its emphasis under pressure from the Stuart kings who tried to govern both sacred and temporal affairs in Scotland. Andrew Melville, the second-generation reforming leader in the late sixteenth century, is remembered for pressing the separateness of the two spheres of authority ('Kingdoms') that are both under God but do not overlap.

This study has found that the settlement of Church-state relations enshrined in the 1921 Act and Articles Declaratory presumed the Melvillian view, i.e. of two realms of sovereignty. Consequently the Church's constitutional situation today is, by historical chance, particularly faithful to one strand of post-Reformation thought. This thesis suggests that there are better ways for the Reformed Christian tradition to understand the legal relationship of the sacred and secular and address its practical implications.

The arrangement formalised in 1921 cured the diplomatic difficulties faced by the Church of Scotland in negotiations towards eventual union with the United Free Church. The Act necessarily confined itself to technical, legal language; the Articles are primarily theological declarations; neither expresses any analysis in political science and jurisprudence – that is the task of those who apply the texts in practice or examine them academically. This study concludes that the secondary literature surrounding the Act and Articles treats them as if they enshrine a kind of

‘two states’ solution to the boundary disputes between the Church’s courts and the civil magistrate. Different expressions of Church-state dualism belong to quite different periods of Church history: Augustine’s two ‘cities’; Gelasius’ two ‘swords’; the two ‘regimes’ understanding of medieval civil law; the two ‘Kingdoms’ of the Reformation. The contribution of 1921 – or rather of some influential interpretations of the 1921 texts – is close to a theory of two states.<sup>1</sup>

The motivation for such a drastic separation of Church and state was the need to re-assure the United Free Church that they would not find themselves entering, at the Union of the Churches, a situation of state control of their spiritual affairs. The basis of separation was originally to be recognition of the areas of *spiritualia* defined in the Barrier Act of 1697 and re-affirmed in the 1906 Act anent Spiritual Independence of the United Free Church: worship, government, doctrine and discipline. The effect of the separation, however, has been to create the illusion of a sphere of human sovereignty possessed by the Church and excluding the interest of the civil law even at points where it might have something to contribute to the interests of justice within the Church.

The case of Helen Percy<sup>2</sup> challenges some of the uses of a separate jurisdiction when the civil law is adequate to the task, a task that has no discernable need to be confined in the way it has within the spiritual authority. It is understandable that the grounds of dismissal used in relation to ministers are more demanding than they are for some other professions, because ministers take vows to live godly and circumspect lives;<sup>3</sup> it is harder to understand why the Church insists on dealing internally with challenges to its decisions on grounds relating to procedural fairness or employment rights. There is a clear theological element to the question of whether women should be ordained as ministers; there is no convincing

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<sup>1</sup> At the time of writing, the debate surrounding the Voice of the People movement in Israel/ Palestine provides an intriguing demonstration of ‘two states’ thinking. That movement and campaign, straddling the physical and social divide in those countries, suggests a solution where the land belongs to two states, each having Jerusalem as its capital and each with allocated territory under its sovereign authority. While it would be difficult enough to administer a group of territorial fragments, and probably nearly impossible to agree which lands should be allocated to whom, it is at least possible to map the results. In 1921, it might be argued, a comparable exercise was done in allocating the content of the spiritual jurisdiction to the national Church in Scotland, with no attempt at all to map the results – and none possible because of a lack of specification in the first place.

<sup>2</sup> See Chapter Four

<sup>3</sup> A phrase from the Ordination vows

reason why the Church should be unwilling to be judged by the Sex Discrimination Act 1975 like everybody else. The problem is that the Church preserves or claims authority over issues that do not need to lie in a separated-off realm of legal governance, like a very small but quite separate state.

Harold Laski, contemporary with the negotiation of the settlement of 1921, chooses this interpretation. The fears of Figgis about the true nature of Presbyterian polity serve, perversely, to affirm it. The judicial approach to the issue taken in the *Ballantyne* and *Logan* cases (and to a limited extent in the civil hearings of the *Percy* case to date), have followed the sphere sovereignty model. The writings and lectures of the Scottish jurisprudential thinker Sir Neil MacCormick affirm and appear to commend it. All of them have fallen into the tempting trap of seeking a neat characterisation of the Church of Scotland as a humanly sovereign institution, which it is not meant to be. They treat the Church as an interesting project in preserving the *societas perfecta*, while the Church is recovering its Scriptural and tradition role as *communitas*. These commentators take this compromising conclusion much further than the text of the Act and Articles do, though the seeds of the mischief are there in the primary texts, in their language of ‘spheres’.

The contention of this thesis is that the spiritual jurisdiction of the Church of Scotland would change its contours substantially if the exercise of that jurisdiction were strictly reserved only to situations where the Church’s spiritual distinctiveness would be damaged by adjudication of the matter by civil law. In other words, the internal legal powers of the courts of the Church should be used on a case-by-case basis, applying the criterion of freedom of religion and not the criterion of the exercise of pre-determined sphere sovereignty. An example of the criterion based on freedom of belief would be a Genuine Occupational Requirement (in terms of employment equality regulation) to ensure the Christian belief of someone employed as an industrial chaplain. An example of the criterion based on maximising sovereignty is the requirement by an agency of the Church that all its employees have a Christian belief even where there is no spiritual element in their work.

From time to time legitimate challenges are raised against the excesses of the Church’s bid for independent self-regulation. These may come in the form of legal cases or pieces of legislation, and may be bolstered by the changing mindset of an age increasingly inclined to think in terms of the legal human rights of the individual. Because the Church has been tempted to think of its realm of sovereignty as fixed by

the 1921 settlement, it responds to the challenges not by conceding ground but by claiming it can provide ‘equivalence of protection’<sup>4</sup> in the areas in question. It is one thing to ensure that standards of justice and legal process equivalent to those of civil law are guaranteed in the exercise of the Church’s inherent authority; it is a different thing to include in the spiritual jurisdiction causes that could perfectly adequately be adjudicated in the civil courts without prejudice to the Church’s religious principles or interests. This is the question that produced the interesting contrast between the conversation with Alan McDonald and the one with Kenyon Wright in Chapter Five. Mr McDonald sought to minimise the extent of the Church’s jurisdiction and use it only for cases where it would be damaging to the Church’s distinctive beliefs not to do so. Canon Wright sought to maximise the Church’s jurisdiction, believing that what belonged to ‘Caesar’, in Christ’s saying, should be as little as possible. Lord Mackay of Clashfern criticised the nature of that debate, contending that it did not fall to anyone to make a policy decision between maximising and minimising jurisdictions, but each case would fall to be determined by the civil court.

This study demonstrates that the boundaries between the two jurisdictions are far from clearly sketched even in quite general terms, and there is a large margin of discrimination possible even in making the kind of technical judgement Lord Mackay was meaning. The Church has the opportunity, I believe, to make that policy choice in favour of conceding authority to the civil magistrate (by not contending for it in cases of dispute) over parts of the Church’s life that do not fall into the strictest definition of worship, government, doctrine and discipline. In particular, the word ‘discipline’ tends to be used very loosely, almost so that it means whatever it is convenient to the interest of the Church for it to mean. It ought to be more clearly defined as relating only to personal issues of life and doctrine peculiar to the calling of Christian leaders, and corporate issues of superintendence over Church courts and congregations.

This thesis has illustrated two main reasons to take this stricter attitude to the distribution of legal authority between the Church and the civil order. One has been indicated earlier in this Conclusion: the principal Reformers, Luther and Calvin for example, did not isolate the work of the civil magistrate from the service of the

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<sup>4</sup> The phrase that was used in Chapter Four quoting the Church of Scotland’s response to the consultation by the Department of Trade and Industry.

Church. The prince had the potential to create social conditions that were compatible with the interests of the Church and, sometimes, explicitly to advance those interests. His task was certainly not simply to keep out of the way of the Church and stand aside from its exercise of its separate powers. In the Reformed view God is sovereign over all including the temporal domain; so the Church must recognise and respect the civil magistrate, except when the magistrate directly opposes the standards of the Gospel. This clearly supports the relatively narrow view of Church law commended above.

The second reason for reluctance to defend the sovereign sway of the Church as a legal power is the argument about the diakonal sovereignty of God. A Church that remembers it is essentially the Body of Christ should not enthusiastically pursue a legal status at odds with the divine character. A national Church that has enjoyed legal authority and social influence in the past has to take heed of the theologies of power of people like Ruth Page and Walter Wink and the Liberation Theology of the last generation. In turn, that must affect the Church's self-understanding of its dominion – or rather its lack of dominion. The Church cannot emulate the form of government exercised by civil law, because by design it does not possess the faculties of enforcement and coercion, and has always been compromised when it has pretended to have those kinds of powers over people.

The treatment of the concept of Establishment in this study reveals that the Church's problem might be regarded in part as its modern failure to have a clear and agreed view about the meaning of Establishment in Scotland. The Genevan version was the system of civil support for the Church and even the guarantee of the provision of religious ordinances.<sup>5</sup> The English version, by sharp contrast, included the regulation of the Church's affairs – including to some extent its spiritual affairs – by the English (later British) Parliament. The cumulative effect of the Acts of Parliament that defined the Church of Scotland's constitutional position,<sup>6</sup> along with ecclesiastical legislation (including the Barrier Act of 1697 and the Act anent

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<sup>5</sup> It might be argued that sixteenth century Geneva did not encounter the possibility of Erastianism because it was committing the opposite crime, theonomy, the regulation by the spiritual of all aspects of life. It suffices for the present purpose, however, to note that the Scottish inheritance from Calvin's system was the support of the Church by the state, and not any governance of the spiritual by the temporal power.

<sup>6</sup> Acts like those of 1690, 1706-07 and the 1874 Act (removing Patronage)



Spiritual Independence of 1906), was an Establishment of religion much more akin to the version of Geneva than that of England. For example, Thomas Chalmers, the leader of the Disruption of 1843, did not confuse Establishment with a lack of spiritual freedom and he left the Established Church with great reluctance in pursuit of that quite different goal of spiritual self-determination. Significant personalities like James Barr (the United Free Church minority leader) could not be persuaded that Establishment need not inevitably involve the state's regulation of religion.<sup>7</sup> For the sake of these concerns, those who devised the 1921 provisions had to emphasise the removal of any connection between the Church and what Bagehot would call the 'efficient' parts of the British constitution, i.e. Parliament, the law and the courts. Chapter Three of this thesis points out that the remaining elements of Scottish Establishment are almost all 'dignified' i.e. ceremonial parts of the constitution, relating to the monarchy not to the law. This emasculation of the effective legal relationship between the two authorities was meant to mollify fearful Voluntarists (and in the end did not even succeed in its intent, as Barr and others refused to come in to the 1929 Union). However, the eradication for this purpose of the language of Establishment – the symbol of a constructive relationship between Church and society – was one of the things that set the united Church of Scotland on the defensive path of defining a sphere of sovereignty and repelling all threats to it for as long as possible.

The conversations paraphrased in Chapter Five explored, amongst other issues, two distinctive ways of exercising spiritual liberty, neither of which involved the co-operation of Church and state according to the usual Reformed models. The first of these involves resorting to a reliance on individual human rights, especially the right of pursuing one's religion. This study has found that a rights basis does not sit well with a theology of divine covenant, because the former assumes that the individual human is the initiating figure claiming entitlements against authority, while the latter understands that God takes the initiative and directs the relationship and responsibilities of the believer. The former, in other words, locates sovereignty in the individual human while the latter recognises only the sovereignty of God.

If the human rights model is located entirely on the temporal side of the temporal/spiritual divide, the other alternative approach presumes no help at all from

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<sup>7</sup> See for example, Barr, *Scottish Church Question*, Chapter XV 'Back to Establishment'

beyond the Church. The resort to individual conscience (in a religious person a kind of spiritual discernment) means doing exactly what seems to be right and taking whatever are the consequences from the magistrate. Sometimes this will be admired by society beyond the Church (e.g. some instances of non-violent protest) and sometimes it will be abhorred (e.g. the differential treatment of men and women in some traditions of Christianity). It must be the inevitable last resort in a situation where the Church cannot expect to be honoured in its distinctiveness to any extent by the civil order. The situation of the Church of Scotland is not in quite so parlous a state, and there still exists a complex of ways in which the national Church in Scotland and the institutions of governance of the nation engage with each other for mutual benefit. However far a Church's interests and principles overlap with those of the civil order, to that extent the individual does not need to step outside the civil law in expressing his or her own conscience, and happily the need to flout the civil law is still a rare occurrence for Scottish Christians.

A building analogy may serve to explain the contribution that this broad sweep of inter-disciplinary research has tried to make. The Articles Declaratory of the Constitution of the Church of Scotland articulate many of the features of the contemporary Church, for example its national, territorial responsibility, its confessional doctrinal base and its permanent ecumenical mandate. Even in the problematic Fourth and Sixth Articles that have been a focus of this thesis, the classic Reformed view of the relationship of Church and world can be found intact. The historical narrative of this thesis has supported the argument that the philosophical, jurisprudential and sociological foundations beneath the settlement, not visible on the surface of the text itself, were weak at the time of its construction and have certainly crumbled away dangerously in the last eighty years. Legal and jurisprudential analysis was useful to identify the strains within the operation of the settlement and the places where complete collapse was likely to follow. The construction of new foundations has been essentially a theological task, rightly so if it is to contribute to an understanding of part of the nature of the Church.

Chapter Six provides a conceptual foundation for the constitutional position of the Church. Beginning with the recognition of the diakonal nature of the sovereignty of God, and therefore of the Church as God's instrument, the argument contends for the Church modelling an uncoercive and fundamentally fragile kind of

authority, in the world but emphatically not of it. The strongest echoes of that ideal in this research come in the *Defensor Pacis* of Marsilius of Padua, written long before the emergence of the Continental Reformers. The contribution of the Reformation, especially in Scotland, was the acknowledgement of the relationship between God and the Church as one of covenant sovereignty on God's part. This removed from the Church's mandate any task of negotiating and trading authority or influence with any other power, divine or human. The Church is called to its task, defined for it by God, and has the responsibility to discern what that task is and be careful not to exceed it.

In Chapter Five, the Principal Clerk, Finlay Macdonald, suggested that it would be healthier to make a conscious review of the 1921 settlement than let it fade out of all relevance. This thesis articulates the principles on which that review should be conducted, and begins the task by addressing those two of the Articles Declaratory that set out the Church's constitutional position. This argument does not deny a place for sovereignty in the Church, but re-affirms that it can only be the sovereignty of God. As legal sovereignty in the civil order has fragmented, eroded and dissipated while communities reshape and remake themselves, the Church has been forced by the experience (and to some extent the loss) of its secular partner to examine itself and ask its own questions about authority and power.

In 1921 a settlement was reached that tried to resolve some of the issues of the tension that had existed between the Church and state in Scotland, partly to settle long-existing questions and partly to facilitate the 1929 Union. The conclusions of this study suggest that the situation is far more complicated than the protagonists in 1921 thought they had made it; and so this thesis has left quite a different kind of task for the Church, as expressed by Stanley Hauerwas:

‘So we have wanted to underscore that Christians are called first and foremost not to resolve the tension between church and state, but to acknowledge the kingship of Christ in their lives, which means leaving church-state relations profoundly unresolved, until the day when He comes again in glory.’<sup>8</sup>

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<sup>8</sup> Hauerwas, *In Good Company: the Church as Polis*, p. 216

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## RECORDED CONVERSATION – BASIS OF RESEARCH USE

Researcher: Rev Marjory A MacLean, 12/7, Iona Street, Leith, Edinburgh EH6 8SF

Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: *Graham Blant*

Date of conversation: *18/12/01*

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Conversation partner: Rev. Dr F.A.J. Macdonald

Date of conversation: 20 Dec 2001

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Conversation partner: NEIL MACCORMICK

Date of conversation: 21 DEC 01

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Conversation partner: VERY REV DR JAMES HARKNESS

Date of conversation: 22 JAN 02

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### Copyright:

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U (Date)...22 JAN 02

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## RECORDED CONVERSATION – BASIS OF RESEARCH USE

Researcher: Rev Marjory A MacLean, 12/7, Iona Street, Leith, Edinburgh EH6 8SF

Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: RICHARD HOLLOWAY

Date of conversation: 1 FEB 2002

### Citation basis:

- ☒ a. The conversation may be cited and quoted at any time and to any extent, provided that the views expressed are attributed to the conversation partner as an individual and not to any Church, political party or organisation.
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### Copyright:

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(Date) 1.2.02

(Date) 1/2/02



## RECORDED CONVERSATION – BASIS OF RESEARCH USE

Researcher: Rev Marjory A MacLean, 12/7, Iona Street, Leith, Edinburgh EH6 8SF

Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: BISHOP BRUCE CAMERON

Date of conversation: 11 FEBRUARY 2002

### Citation basis:

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(Date)...11/2/02...

(Date)...11/2/02....



## RECORDED CONVERSATION – BASIS OF RESEARCH USE

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Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: REV ALAN McDONALD

Date of conversation: 12 FEB 2002

### Citation basis:

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(Date) 12 02 02

(Date) 12/2/02



## RECORDED CONVERSATION – BASIS OF RESEARCH USE

Researcher: Rev Marjory A MacLean, 12/7, Iona Street, Leith, Edinburgh EH6 8SF

Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: CANON KENYON WRIGHT

Date of conversation: 14 FEB 02

### Citation basis:

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(Date).....14/2/2002

(Date).....14/2/02.....



## RECORDED CONVERSATION – BASIS OF RESEARCH USE

Researcher: Rev Marjory A MacLean, 12/7, Iona Street, Leith, Edinburgh EH6 8SF

Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: PROFESSOR STEVE BRUCE

Date of conversation: 6 MARCH 2002

### Citation basis:

- ☒ a. The conversation may be cited and quoted at any time and to any extent, provided that the views expressed are attributed to the conversation partner as an individual and not to any Church, political party or organisation.
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(Date)...6/3/02...

(Date)...6/3/02...



## RECORDED CONVERSATION – BASIS OF RESEARCH USE

Researcher: Rev Marjory A MacLean, 12/7, Iona Street, Leith, Edinburgh EH6 8SF

Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: LORD HOLL OF CUMBERNAULD

Date of conversation: 20 MARCH 2002

### Citation basis:

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.....

(Date).....20/3/02

(Date).....20/3/02.....



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Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: LORD MACKAY OF CLASHFERN

Date of conversation: 20 MARCH 2002

### Citation basis:

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(Date) 20. iii. 02

(Date) 20/7/02



## RECORDED CONVERSATION – BASIS OF RESEARCH USE

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Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: **JIM WALLACE MSP**

Date of conversation: **29<sup>th</sup> January 2008**

### Citation basis:

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U (Date). **29/1/02**

(Date) **29/1/02**



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Researcher: Rev Marjory A MacLean, 12/7, Iona Street, Leith, Edinburgh EH6 8SF

Ph.d. working title: *The Crown Rights of the Redeemer: A Reformed Approach to Sovereignty for the National Church in the 21<sup>st</sup> Century*

Conversation partner: Patrick Hodge A.C.

Date of conversation: 14 December 2001

### Citation basis:

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as the basis of the conversation partner in his capacity as Provost - they are personal views.

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Any agreement on the use of this material should not have effect until after the Helen Perry case has been finally determined.  
18/11

(Date).....14 December 2001

(Date).....14/12/01